(8)

No. 92-1812-CFY
Status: GRANTED

Title: United States, Petitioner
v.
Pedro Alvarez-Sanchez

Docketed:
May 12, 1993

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Gunn,Carlton F.

4-13-93 ext til 5-22-93, J. O'Connor - CITED.

Entry	Date	Note	Proceedings and Orders
1	Apr 13 1993	G	Application (A92-778) to extend the time to file a petition for a writ of certiorari from April 22, 1993 to May 22, 1993, submitted to Justice O'Connor.
2	Apr 13 1993		Application (A92-778) granted by Justice O'Connor extending the time to file until May 22, 1993.
3	May 12 1993	G	Petition for writ of certiorari filed.
5	Jun 9 1993		Order extending time to file response to petition until July 11, 1993.
7	Jul 12 1993		Brief of respondent Pedro Alvarez-Sanchez in opposition filed.
8	Jul 12 1993	G	Motion of respondent for leave to proceed in forma pauperis filed.
6	Jul 14 1993		DISTRIBUTED. September 27, 1993
9	Sep 3 1993	X	Reply brief of petitioner filed.
11	Oct 4 1993		REDISTRIBUTED. October 8, 1993
12	Oct 12 1993		Motion of respondent for leave to proceed in forma pauperis GRANTED.
13	Oct 12 1993		Petition GRANTED.
			**********
14	Nov 5 1993		Record filed.
		*	Certified record proceedings U.S. Court of Appeals, Ninth Circuit and U.S.District Court,C.Calif. (BOX)
15	Nov 26 1993		Brief of petitioner United States filed.
16	Nov 26 1993		Joint appendix filed.
20	Dec 27 1993	X	Brief of respondent Pedro Alvarez-Sanchez filed.
17	Dec 29 1993		SET FOR ARGUMENT TUESDAY, MARCH 1, 1994. (3RD CASE).
19	Jan 7 1994		CIRCULATED.
21	Jan 31 1994	X	Reply brief of petitioner United States filed.
22	Mar 1 1994		ARGUED.

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No. 92-1812

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

PEDRO ALVAREZ-SANCHEZ

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether a confession given to federal authorities while a suspect is in state custody awaiting arraignment on state charges must be suppressed as a result of delay between the suspect's original arrest by state authorities and his eventual presentment on the federal crime to which he confessed.

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In the Supreme Court of the United States

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v.

PEDRO ALVAREZ-SANCHEZ

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Acting Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-40a) is reported at 975 F.2d 1396. The order of the district court (App., *infra*, 41a-50a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 1992. A timely petition for rehearing was denied on January 22, 1993. App., *infra*, 60a. On April 13, 1993, Justice O'Connor extended the time for filing a petition for a writ of certiorari

to and including May 22, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND RULE INVOLVED

In pertinent part, 18 U.S.C. 3501 provides:

> (a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession * * * shall be admissible in evidence if it is voluntarily given.
>
> * * * * *
>
> (c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided*, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.

> (d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

In pertinent part, Rule 5(a), Fed. R. Crim. P., provides:

> An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041.

STATEMENT

After a jury trial in the United States District Court for the Central District of California, respondent was convicted on one count of fraudulently possessing counterfeit United States currency, in violation of 18 U.S.C. 472. App., *infra*, 2a. The court of appeals reversed. App., *infra*, 1a-40a.

1. On Friday, August 5, 1988, officers of the Los Angeles Sheriff's Department obtained a warrant to search respondent's residence for heroin, heroin paraphernalia, and other evidence of narcotics distribution constituting a felony under California law. The warrant was executed later that afternoon and resulted in the discovery and seizure of narcotics, as well as rent receipts in respondent's name. The state authorities also recovered a total of $2,260 in counterfeit United States currency. Respondent was ar-

rested based on his possession of the narcotics, and he was "booked" at approximately 5:40 p.m. He spent the weekend in the custody of state authorities. App., *infra*, 54a, 57a.

Because of the counterfeit currency found during the search, the Sheriff's Department contacted the United States Secret Service on Monday morning, August 8, 1988. At approximately 11:30 a.m., Secret Service Special Agents Paul Lipscomb and John Bozzuto arrived at the Sheriff's Department and took possession of the counterfeit currency from the state authorities. The federal agents were then taken to an interview room, where they were introduced to respondent. At the request of the agents, a Spanish-speaking deputy sheriff advised respondent of his *Miranda* rights and served as an interpreter. App., *infra*, 51a-52a, 54a-55a, 58a. Respondent stated that he understood his rights, that he knew "what this was all about" because he had been a police officer in Mexico, and that he was willing to talk to the agents and to sign a waiver of his rights. After respondent signed the waiver form, he admitted that he had known the currency was counterfeit, but he claimed that a friend had found it abandoned in a motel room. The interview was terminated shortly thereafter when respondent invoked his right to remain silent, explaining that he had no desire to implicate others. App., *infra*, 52a.

The Secret Service agents arrested respondent. They then took him from the Sheriff's Department to the Secret Service field office for booking, a drive that took approximately 55 minutes. Once at the field office, the agents took respondent's fingerprints and photographs and obtained a brief personal history. The agents also prepared a criminal complaint.

Those procedures took approximately three hours, owing in part to the need to obtain typing services and to procure a Spanish interpreter to elicit booking information from respondent. At approximately 2:30 p.m., Special Agent Lipscomb telephoned the court to advise that respondent was in federal custody and that he would be brought for arraignment before the magistrate that afternoon. The court clerk told Special Agent Lipscomb that the magistrate's calendar was full for the day, and directed the Secret Service to take respondent to the magistrate the following morning. Respondent was lodged for the evening in the federal detention center and was presented on the federal complaint on Tuesday, August 9, 1988. See 10/31/88 Tr. 10-16; App., *infra*, 52a-53a.

2. Respondent was indicted for violating 18 U.S.C. 472. He moved to suppress the statement he made while in the custody of the Los Angeles Sheriff's Department on the ground, *inter alia*, that the delay between his state arrest and federal presentment rendered the confession inadmissible under 18 U.S.C. 3501(c). The district court denied respondent's suppression motion. App., *infra*, 41a-50a. The court first rejected respondent's claim that he did not voluntarily waive his rights under *Miranda*. Turning to respondent's Section 3501(c) claim based on the delay in presenting him to a federal magistrate, the court concluded that suppression was not warranted in this case. The court explained:

> [T]here is no evidence in the instant case that the delay in arraignment was for the sole purpose of obtaining a confession or was the result of oppressive police practices prior to obtaining the confession, or that the delay otherwise caused the confession.

> Evidence * * * establishes that the defendant was taken into federal custody, transported, processed, fingerprinted and photographed immediately upon interrogation, and that arraignment was delayed until the next morning only because, due to the lateness of the day, the magistrate's calendar was full once booking was completed.

App., *infra*, 49a. The court also noted that respondent "offered no evidence [of] a collusive arrangement between state and federal agents for purposes of obtaining the confession," and that "[t]he delay *after* the confession and before [respondent's] federal arraignment obviously ha[d] no effect on the prior confession and would not render it inadmissible." *Id.* at 50a. Respondent was subsequently convicted after a jury trial at which the confession was admitted.

3. The court of appeals reversed. The court concluded that respondent's confession was obtained more than six hours after his arrest, and that the government therefore could not invoke the six-hour "safe harbor" period provided by Section 3501(c), during which voluntary confessions "shall not be inadmissible solely because of delay in bringing [the arrestee] before a magistrate." The court rejected the government's contention that time spent by a defendant in state custody should be charged to the federal government only when "the defendant can show evidence of collusion between local and federal authorities." App., *infra*, 20a-21a n.8. Instead, the court concluded that periods of state and federal custody "should always be aggregated" in calculating the period of pre-presentment delay. That conclusion rendered the six-hour "safe harbor" period unavail-

able in this case, because respondent's confession was not made within six hours of his arrest by state officers. *Ibid.*

The court then turned to an analysis of the options open to a court under 18 U.S.C. 3501 when a confession is made more than six hours after arrest. The court noted that several circuits have held that such confessions may be suppressed only if they are shown to be involuntary under Section 3501(a). App., *infra*, 11a-13a. The court did not follow that approach, however, because it appeared to believe that its earlier cases left open only two other alternatives. The court explained that some of its cases had required suppression of confessions made outside the six-hour "safe harbor" period based on supervisory rules developed by this Court before Section 3501 was enacted, whereas its decision in *United States* v. *Halbert*, 436 F.2d 1226 (9th Cir. 1970), and cases following *Halbert* had tempered that automatic rule by vesting trial courts with "discretion" to exclude confessions given more than six hours after arrest as "involuntary," even if the delay had no effect on the suspect's free will. App., *infra*, 15a-20a. The court stated that it was unnecessary to choose which line of circuit precedent should be deemed controlling, because respondent's confession was inadmissible under both approaches. *Id.* at 20a-23a.

The dissenting judge would have affirmed respondent's conviction. He found "no evidence that any delay in bringing [respondent] before the magistrate was used to lengthen the interrogation." App., *infra*, 40a. Because respondent clearly knew of the nature of the charges under investigation and readily admitted his involvement at the beginning of the inter-

rogation, the dissenting judge would have found the confession admissible. *Ibid.*

REASONS FOR GRANTING THE PETITION

This case presents two related questions of federal criminal procedure on which the circuits are divided. First, the Ninth Circuit concluded that a suspect's arrest on state charges qualifies as the "arrest or other detention" contemplated by 18 U.S.C. 3501. That conclusion conflicts with decisions of five other courts of appeals. Second, the court of appeals concluded that a confession given more than six hours after arrest may be suppressed solely to penalize the Government for the delay, and stated that suppression was warranted solely by the Monday-to-Tuesday delay that *followed* the confession in this case. That conclusion conflicts with decisions of other courts of appeals holding that 18 U.S.C. 3501(a) mandates admission of any confession that "is voluntarily given."

1. a. The court of appeals' decision that state and federal custody must "always" be aggregated for purposes of assessing pre-arraignment delay conflicts with the text of Section 3501(c). That statute provides that a voluntary confession given by a suspect within six hours of his "arrest or other detention" is not inadmissible solely because of delay in taking him "before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States." That six-hour "safe harbor" period may be extended if the delay is reasonable considering, among other things, "the distance to be traveled to the nearest * * * such magistrate or other officer." The statute therefore plainly contemplates that a suspect's "arrest or other detention" must be of the kind that triggers an appearance before a judicial officer authorized to set bail for those charged with *federal* crimes—*i.e.*, that the only relevant arrests are those made for violations of federal law. Because respondent was not under "arrest or other detention" for a federal offense when he confessed, his confession was not suppressible under Section 3501. See 18 U.S.C. 3501(d).

Nothing in Rule 5, Fed. R. Crim. P., supports the Ninth Circuit's conclusion that an arrest on state charges triggers a duty to arraign the suspect speedily on any federal charges. App., *infra*, 22a n.9. Rule 5 requires that an arrested suspect be taken without unnecessary delay to "the nearest available federal magistrate" or to a state judge authorized to set bail for federal offenses under 18 U.S.C. 3041. As its text makes clear, the Rule is part of "[t]he scheme for initiating a *federal* prosecution." *Mallory* v. *United States*, 354 U.S. 449, 454 (1957) (emphasis supplied). Thus, like Section 3501, the Rule is addressed to arrests for violations of federal law, and does not control the actions of state officers enforcing their own laws. Cf. *Gallegos* v. *Nebraska*, 342 U.S. 55, 63-65 (1951) (plurality opinion). See also *United States* v. *Davis*, 437 F.2d 928, 931 (7th Cir. 1971) (Stevens, J.) ("Rule 5(a) prescribes the procedure to be followed when a suspect is taken into federal custody," and therefore "it was permissible for the F.B.I. agent to question [the defendant] while he was in state custody."). Indeed, the Rule is not violated by the failure to arraign a suspect who is questioned about a new federal crime while he is already in lawful custody for other charges under federal authority. See *United States* v. *Carignan*, 342 U.S. 36, 43-45 (1951) ("Rule 5 * * * does not

apply in terms, because Carignan was neither arrested for nor charged with the murder when the confession to that crime was made."). See also *Abel* v. *United States*, 362 U.S. 217, 225-230 (1960).

Rejection of the Ninth Circuit's conclusion is also required by the need to avoid the anomalous consequences that would follow from its ruling that state arrests trigger ~~federal~~ arraignment obligations—obligations enforced through a suppression remedy. *See United States* v. *Brown*, 333 U.S. 18, 26-27 (1948). As this case demonstrates, federal officers may not learn of a suspect's existence, much less of the possibility that he committed a federal crime, until the suspect has been lawfully detained for some time on state-law charges. Forbidding federal courts from admitting statements obtained during such lawful state custody serves none of the deterrent purposes of the exclusionary rule. See, *e.g.*, *United States* v. *Carignan*, 342 U.S. at 41-45; *Illinois* v. *Krull*, 480 U.S. 340, 347-355 (1987). See also *Abel* v. *United States*, 362 U.S. at 240. In addition, as this case also demonstrates, the government may well lack grounds for a federal charge against a person who is already in state custody absent "further inquiry and investigation." *United States* v. *Carignan*, 342 U.S. at 44; see also *Mallory* v. *United States*, 354 U.S. at 455. Here, the federal crime on which respondent was convicted requires proof that the defendant was aware of the counterfeit nature of the currency, see 18 U.S.C. 472, an element on which (absent inquiry of respondent) there might have been insufficient proof on the facts known to the Secret Service agents when they first approached respondent.

b. The rule adopted by the Ninth Circuit is also inconsistent with this Court's treatment of state custody before Section 3501(c) was enacted. In *McNabb* v. *United States*, 318 U.S. 332, 341-347 (1943), this Court "[i]n the exercise of its supervisory authority over the administration of criminal justice in the federal courts," *id.* at 341, held inadmissible confessions obtained as the direct result of federal officers' failure to comply with a statute mandating the speedy arraignment of suspects. Following the adoption of Rule 5, which replaced the statute on which *McNabb* relied, the Court reaffirmed the *McNabb* rule in *Mallory* v. *United States*, 354 U.S. at 453-456.

Consistent with its roots in this Court's supervisory authority, the *McNabb-Mallory* rule focused on depriving federal officers of the fruits of their wrongdoing. The Court did not apply the doctrine to confessions obtained by state officers, see *Gallegos* v. *Nebraska*, 342 U.S. at 63-65 (plurality opinion), except when state officers illegally detained a suspect at the behest of federal agents. Thus, in *Anderson* v. *United States*, 318 U.S. 350 (1943), decided the same day as *McNabb*, the Court required suppression of a confession where the record disclosed "a working arrangement" between federal and state officers that enabled federal officers to secure the confession "improperly." 318 U.S. at 356. Applying the rule of the *Anderson* case, the Second Circuit in *United States* v. *Coppola*, 281 F.2d 340, 344-345 (2d Cir. 1960) (en banc), upheld the admission of a confession made by a suspect to a federal agent while the suspect was in the custody of the local police. The suspect had been arrested by the local police on their own initiative, but on a crime both governments were investigating. This Court granted certiorari, heard argu-

ment, and summarily affirmed. See *Coppola* v. *United States*, 365 U.S. 762 (1961) (*per curiam*).[1] Thus, by the time Section 3501(c) was enacted in 1968, the law was well settled that, absent collusion, confessions made to federal officers by suspects in state custody did not trigger federal arraignment obligations.

c. Because neither the statutory language nor the supervisory rule it replaced lends any support to the Ninth Circuit's view that state and federal custody must "always" be aggregated, five courts of appeals that have considered that issue since Section 3501 was enacted have disagreed with that conclusion. Those courts have concluded that Section 3501(c) either is not triggered at all by a state arrest, or is triggered by such an arrest only when the defendant demonstrates that federal and state authorities colluded with the specific purpose of depriving him of a speedy federal arraignment. See *United States* v. *Carter*, 910 F.2d 1524, 1528 (7th Cir. 1990), cert. denied, 111 S. Ct. 1628 (1991); *United States* v. *Barlow*, 693 F.2d 954, 957-959 (6th Cir. 1982), cert. denied, 461 U.S. 945 (1983); *United States* v. *Van*

[1] Significantly, the petitioner in *Coppola* had urged not only the existence of an improper "working arrangement" under *Anderson*, but also that the "working arrangement" requirement for inadmissibility should be overruled in light of this Court's decision in *Elkins* v. *United States*, 364 U.S. 206 (1960). See Brief for Petitioner at 26-33, *Coppola* v. *United States*, No. 153 (O.T. 1960). *Elkins* held that evidence seized by state officers in violation of the Fourth Amendment is not admissible in federal prosecutions, even if the federal government did not participate in the constitutional violation. This Court rejected that argument. See *Coppola* v. *United States*, 365 U.S. at 762 ("We find no merit in the other argument advanced by the petitioner.").

Lufkins, 676 F.2d 1189, 1192-1193 (8th Cir. 1982); *United States* v. *Torres*, 663 F.2d 1019, 1023-1024 (10th Cir. 1981), cert. denied, 456 U.S. 973 (1982); *United States* v. *Rollerson*, 491 F.2d 1209, 1212 (5th Cir. 1974). By departing from the uniform rule on this issue, the decision of the court of appeals in this case, if allowed to stand, will cause confusion on an issue of federal criminal procedure that arises with some frequency.[2] In addition, it will hamper effective cooperation with state authorities in a circuit that accounts for a large number of federal criminal cases. This Court's review is necessary to resolve the conflict among the circuits and restore uniformity in the construction of Section 3501(c).

2. The court of appeals also concluded that a confession given more than six hours after arrest may be suppressed solely to penalize the government under the *McNabb-Mallory* rule—either as a pure exercise of supervisory power or by "balancing" the voluntariness of the confession against the "unreasonableness" of the delay. App., *infra*, 21a-23a & n.10. Reversal of the Ninth Circuit's erroneous conclusion that the relevant arrest was effected by California authorities will obviate the need to consider that additional question. But even if the Court were to agree with the court of appeals that the state arrest is the pertinent "arrest" for purposes of Section 3501(c), the court of appeals' decision would still warrant plenary review for two independent reasons.

[2] See, *e.g.*, *United States* v. *White*, 979 F.2d 539, 543 (7th Cir. 1992); *United States* v. *Watson*, 591 F.2d 1058, 1061-1062 (5th Cir.), cert. denied, 441 U.S. 965 (1979); *United States* v. *Jensen*, 561 F.2d 1297, 1299 (8th Cir. 1977); *United States* v. *Gaines*, 555 F.2d 618, 622 (7th Cir. 1977); *United States* v. *Elliott*, 435 F.2d 1013, 1015 (8th Cir. 1970).

a. Section 3501(c) does not prescribe what consequences must follow when a confession is made outside the six-hour "safe harbor" period. The statute provides only that some confessions shall be admitted; it does not state that all other confessions must be suppressed. See *United States* v. *Halbert*, 436 F.2d at 1232; see also *United States* v. *Marrero*, 450 F.2d 373, 378 (2d Cir. 1971), cert. denied, 405 U.S. 933 (1972). As the Ninth Circuit noted in this case, see App., *infra*, 13a-15a, some courts of appeals have concluded that non-safe harbor confessions may be suppressed under the *McNabb-Mallory* rule, while other circuits have concluded that Congress overruled *McNabb-Mallory* by enacting 18 U.S.C. 3501(a), which provides that "a confession * * * shall be admissible in evidence if it is voluntarily given." See also *United States* v. *Christopher*, 956 F.2d 536, 538-539 (6th Cir. 1991) (collecting authorities), cert. denied, 112 S. Ct. 2999 (1992). We believe the text of Section 3501(a), and its legislative history,[3] clearly reflect Congress's intent to reject the *McNabb-Mallory* rule. The Ninth Circuit therefore erred in applying that doctrine in this case.[4]

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[3] The Senate Report that accompanied Section 3501(a) stated: "These decisions have resulted in the release of criminals whose guilt is virtually beyond question. * * * The general public is becoming frightened and angered by the many reports of depraved criminals being released to roam the streets in search of other victims. For example, the infamous Mallory was convicted on another rape charge shortly after his first rape conviction was reversed by the Supreme Court." S. Rep. No. 1097, 90th Cong., 2d Sess. 41 (1968).

[4] The need for plenary review in this case is not lessened by the fact that, in a footnote at the end of its opinion, the Ninth Circuit purported to find respondent's confession "involuntary" under its earlier decision in *Halbert*. The Ninth Circuit's discussion of *Halbert* and its progeny, see App., *infra*, 15a-17a, 22a, leaves no doubt that its concept of "involuntariness" includes factors completely unrelated to free will, and that (as construed by the court of appeals in this case) the *Halbert* approach permits suppression when a confession is voluntary in the traditional sense. Indeed, the Ninth Circuit's conclusion that respondent's confession was "involuntary" was based on a "balancing" of factors affecting free will against the perceived "unreasonableness" of the government's conduct. App., *infra*, 23a n.10. That analysis is erroneous. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225-226 (1973).

b. Even assuming the *McNabb-Mallory* rule remains the law, the Ninth Circuit's application of the rule in this case is contrary to this Court's decision in *United States* v. *Mitchell*, 322 U.S. 65 (1944).[5] The Ninth Circuit expressly rested its decision to suppress on the purported misconduct of federal agents in delaying respondent's arraignment from Monday afternoon to Tuesday morning—*after* respondent had given the confession at issue. App., *infra*, 21a. Nothing in the record supports the court of appeals' conclusion that

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[5] In fact, because respondent was advised of his rights as required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and voluntarily waived those rights, he should be barred from any claim under *McNabb-Mallory*. As several circuits have concluded, see, *e.g.*, *United States* v. *Salamanca*, Nos. 91-3057 & 91-3058 (D.C. Cir. Apr. 9, 1993), slip op. 8-9; *United States* v. *Barlow*, 693 F.2d at 959; *United States* v. *Indian Boy X*, 565 F.2d 585, 591 (9th Cir. 1977), cert. denied, 439 U.S. 841 (1978); *O'Neal* v. *United States*, 411 F.2d 131, 136-137 (5th Cir.), cert. denied, 396 U.S. 827 (1969), *Miranda* warnings supply the words of "caution" that the Court found lacking in *McNabb* and *Mallory*. See *Mallory* v. *United States*, 354 U.S. at 455.

the delay in presenting respondent was the result of misconduct; on the contrary, the record is clear that the delay was caused by the congestion in the magistrate's docket, and that respondent was not interrogated and made no statement during that delay. In any event, *Mitchell* holds that post-confession delay, even if improper, does not affect the admissibility of a confession. In *Mitchell*, the defendant confessed shortly after his arrest, but his arraignment was then illegally delayed for eight days. This Court reversed an order suppressing the confession, explaining:

> [T]he illegality of Mitchell's detention does not retroactively change the circumstances under which he made the disclosures. These, we have seen, were not elicited through illegality. Their admission, therefore, would not be use by the Government of the fruits of wrongdoing by its officers. Being relevant, they could be excluded only as a punitive measure against unrelated wrongdoing by the police. Our duty in shaping rules of evidence relates to the propriety of admitting evidence. This power is not to be used as an indirect mode of disciplining misconduct.

United States v. *Mitchell*, 322 U.S. at 70-71. That understanding, which comports with the reasons for the exclusionary rule, has informed the construction given by other circuits (and by the Ninth Circuit in earlier cases) to the term "delay" in Section 3501(c). See, *e.g.*, *United States* v. *Cruz Jimenez*, 894 F.2d 1, 8 (1st Cir. 1990); *United States* v. *Montes-Zarate*, 552 F.2d 1330, 1331 (9th Cir. 1977), cert. denied, 435 U.S. 947 (1978). The Ninth Circuit's ruling departing from settled law in this area warrants plenary review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Assistant to the Solicitor General

MAY 1993

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

PEDRO ALVAREZ-SANCHEZ, DEFENDANT-APPELLANT

No. 89-50060
D.C. No. 88-0671-CBM

Appeal from the United States District Court
for the Central District of California
Consuelo B. Marshall, District Judge, Presiding

Argued and Submitted
November 9, 1990—Pasadena, California

Filed September 15, 1992

Before: Dorothy W. Nelson and Stephen Reinhardt, Circuit Judges, and Edward Dean Price,* Senior District Judge.

Opinion by Judge Reinhardt; Dissent by
Senior District Judge Price

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* The Honorable Edward Dean Price, Senior District Judge for the Eastern District of California, sitting by designation.

OPINION

REINHARDT, Circuit Judge:

The defendant, Pedro Alvarez-Sanchez, was convicted after a jury trial of possession of counterfeit government obligations in violation of 18 U.S.C. § 472. During the trial, the government introduced in evidence a confession obtained while the defendant was in custody. The defendant had moved to suppress his confession on the ground that it was inadmissible under 18 U.S.C. § 3501 due to the delay between his arrest and arraignment. The district court denied the defendant's motion, and he appeals that denial. We review de novo the district court's decision to admit the confession. *See United States v. Gonzalez-Sandoval*, 894 F.2d 1043, 1048 (9th Cir. 1990); *United States v. Wilson*, 838 F.2d 1081, 1085-86 (9th Cir. 1988). We reverse and remand.

I

The facts, as found by the district court in its denial of the defendant's suppression motion, are relatively simple. On Friday August 5, 1988, Alvarez-Sanchez was arrested by Los Angeles Sheriff's deputies on narcotics charges during the execution of a search warrant on his residence. During the search, the deputies recovered $2,260 in counterfeit money; the Secret Service was notified. Although the state never pursued any narcotics or other prosecution against Alvarez-Sanchez, he remained in state custody throughout the weekend. On Monday August 8, 1988, while still in state custody, Alvarez-Sanchez was interviewed by federal agents, one of whom was apparently fluent in Spanish. After agreeing to

waive his *Miranda* rights, Alvarez-Sanchez confessed to knowing possession of the counterfeit money. Later that afternoon, the federal agents took custody of the defendant, and the next morning, Tuesday August 9, he was arraigned before a federal magistrate.

II

The defendant argues that his confession was inadmissible because it was obtained during a period of unreasonable pre-arraignment delay. Rule 5(a) of the Federal Rules of Criminal Procedure requires that an arrested person be arraigned before a magistrate "without unnecessary delay." The right to a speedy arraignment codified in Rule 5(a) has been recognized to serve at least three important interests; it: (1) "protect[s] the citizen from a deprivation of liberty as a result of an unlawful arrest by requiring that the Government establish probable cause," (2) "effectuate[s] and implement[s] the citizen's constitutional rights by insuring that a person arrested is informed by a judicial officer" of those rights, and (3) "minimize[s] the temptation and opportunity to obtain confessions as a result of coercion, threats, or unlawful inducements." 113 Cong.Rec. 36,067 (1967); *see also McNabb v. United States*, 318 U.S. 332, 343 (1943) ("The purpose of this impressively pervasive requirement of criminal procedure [that of prompt arraignment] is plain. . . . The awful instruments of the criminal law cannot be entrusted to a single functionary."). Alvarez-Sanchez's case presents us with the problem of determining the circumstances under which the failure to arraign an arrestee within a reasonable time should result in the suppression of his confession.

Nearly fifty years ago, the Supreme Court determined that one appropriate remedy for violations of Rule 5(a) is to suppress confessions obtained during an unnecessary delay in arraignment. *See McNabb*, 318 U.S. at 341. In a line of decisions culminating in *United States v. Mallory*, 354 U.S. 449 (1957), the Supreme Court adopted a general exclusionary rule that rendered inadmissible all confessions obtained during a detention in violation of Rule 5(a). This rule was not as severe as it seemed, however, as not all delays in arraignment violate Rule 5(a)—only "unnecessary delays." As long as the delay was reasonable, it did not violate Rule 5(a). *See, e.g., Muldrow v. United States*, 281 F.2d 903, 905 (9th Cir. 1960); *Williams v. United States*, 273 F.2d 781, 798 (9th Cir. 1959), *cert. denied*, 362 U.S. 951 (1960). Suppression was required only "when the federal officers cannot justify their failure to promptly bring the accused before a committing magistrate, or when the federal officers delay arraignment in order to obtain evidence from the accused." *Smith v. United States*, 390 F.2d 401, 403 (9th Cir. 1968); *Cote v. United States*, 357 F.2d 789, 793 (9th Cir.), *cert. denied*, 385 U.S. 883 (1966). The rule was clear, however, with regard to delays deliberately incurred in order to allow investigating officers time to interrogate the accused—any confession obtained would have to be suppressed. *See Upshaw v. United States*, 335 U.S. 410, 414 (1948).

The continued vitality of the *McNabb-Mallory* remedy for Rule 5(a) violations was made uncertain, however, when in 1968 Congress enacted statutory provisions regarding the admissibility of confessions in federal criminal prosecutions, which provisions are

codified at 18 U.S.C. § 3501 and the text of which is set off in the margin.[1] One of the purposes of this

[1] (a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit

enactment was to limit the *McNabb-Mallory* rule by allowing certain pre-arraignment confessions to be admitted notwithstanding the presence of a Rule 5(a) violation. *See United States v. Halbert*, 436 F.2d 1226, 1231 (9th Cir. 1970). Unfortunately, the text of § 3501 is confusing and has given rise to uncertainty and disagreements among the circuits over the proper application of the provision. *See United States v. Perez*, 733 F.2d 1026, 1034 (2d Cir. 1984) (discreetly describing interpretation of the act as "somewhat murky"). The degree to which the operation of the *McNabb-Mallory* rule has been curtailed is unquestionably *not* clear from the plain language of the statute.

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persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: Provided, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

Two sections of § 3501, sections (a) and (c), appear to address the role of pre-arraignment delay in determining the admissibility of confessions obtained during such delay.[2] The most elaborate, and pertinent, is § 3501(c). That section states that a confession obtained during a pre-arraignment detention "shall not be inadmissible solely because of delay in [arraignment] if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention." The clear effect of this provision is to create a six-hour "safe harbor" during which a confession will not be excludable on the basis of the *McNabb-Mallory* rule. The section also provides that the permissible time for arraignment is extended "in any case in which the delay in [arraignment] is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer." Section 3501(c) is designed to allow the *McNabb-Mallory* rule to operate only when the delay in arraignment exceeds the greater of six hours or the time deemed reasonable by the court in light of the available means of transportation and the distance to the nearest magistrate. *See Perez*, 733 F.2d at 1031. Another way of putting

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[2] In fact, a third section, § 3501(b), also addresses delay in arraignment. Section (b) states that a court "shall take into consideration . . . the time elapsing between arrest and arraignment." However, the primary purpose of the section appears to be to aid courts in making voluntariness determinations under section (a).

it is that § 3501(c) modified the right to speedy arraignments so that delays of less than six hours or delays that are necessary in light of the logistics involved should be considered reasonable *per se* but left unaltered the *McNabb-Mallory* requirement that all confessions given during an *unreasonable* delay in arraignment should be suppressed.

The other section that appears to affect the *McNabb-Mallory* rule is § 3501(a). This section states that "[i]f the trial judge determines that the confession was voluntarily made it shall be admitted in evidence." If, as this language suggests, the section renders the admissibility of a confession dependent only on its voluntariness, then the *McNabb-Mallory* rule is eliminated entirely. Although a prolonged detention *prior to a confession* may weaken a person's will and thereby render a confession involuntary, delay in *arraignment* (which includes both pre- and post-confession delay) does not necessarily affect the voluntariness with which a confession is given. Further, because involuntary confessions are rendered inadmissible by the Constitution regardless of any additional Rule 5(a) violation, *see e.g., Blackburn v. Alabama*, 361 U.S. 199, 206-07 (1960), *McNabb-Mallory* would be purely superfluous. In short, § 3501(a) literally construed would make delay in arraignment that violates Rule 5(a) irrelevant to the admissibility of a confession.

Section 3501 is one of the many statutes, however, which provide strong evidence of the truth of Judge Learned Hand's simple aphorism that "[t]here is no surer way to misread any document than to read it literally." *Guiseppi v. Walling*, 144 F.2d 608, 624 (2d Cir. 1944) (L. Hand, J., concurring), *aff'd*, 324 U.S. 244 (1945); *see also United States v. Monia*,

317 U.S. 424, 431 (1943) (Frankfurter, J., dissenting) ("The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification."). The difficulty with construing § 3501(a) literally—aside from the obvious problem that it would leave violations of speedy arraignment rights remediless—is that to do so would create a clear conflict with § 3501(c) and would render the latter section meaningless. According to section (c), a court is forbidden to suppress a confession solely on the basis of prearraignment delay *only* when the confession is given within six hours of arrest or when the delay in arraignment is due to the distance to the nearest magistrate. But a literal reading of section (a) forbids a court to suppress a confession solely on the basis of prearraignment delay under *all* circumstances. As the Second Circuit has noted, such a construction of section (a) "reads subsection (c) out of the statute." *Perez*, 733 F.2d at 1031; *see also United States v. Erving*, 388 F.Supp. 1011, 1016 (W.D.Wis. 1975).

Courts must not make a fetish of construing statutes in a literal fashion. Our role is not that of a super-grammarian obsessed with the plain meaning of language but rather that of perceptive diviner of congressional intent. *See Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1453 (9th Cir. 1992). In such a role, if possible, "effect shall be given to every clause and part of a statute." *Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208 (1932). Thus, the Supreme Court has held that a court should reject the literal interpretation of a section of an enactment when that interpretation would render a different section meaningless. *See Mountain States Tel. &*

Tel. v. Pueblo of Santa Ana, 472 U.S. 237, 250 (1985). Accordingly, we reject a literal interpretation of § 3501(a)—in light of the provisions of § 3501(c), there must be circumstances in which delay in arraignment will require suppression of a confession regardless of the voluntariness of the confession. *See Perez*, 733 F.2d at 1032; *United States v. Manuel*, 706 F.2d 908, 913 (9th Cir. 1983) ("Section 3501(c), by implication, provides that unreasonable pre-arraignment delay can provide the sole basis for a finding of involuntariness, if the delay exceeds six hours."). The next question, of course, is—what circumstances?

We begin our analysis of the question by reviewing the approaches to § 3501 adopted by other circuits. Although all the opinions we have reviewed consider pre-arraignment delay in determining the admissibility of confessions, the methods by which the circuits perform this function can be divided into two distinct categories. One category involves constructions that attempt to harmonize sections (a) and (c) by expanding the meaning of the term "voluntary" as used in section (a) to include consideration of a factor unrelated to free will—specifically, pre-arraignment delay. The other category involves constructions that recognize that sections (a) and (c) were addressed to different matters—the former to concerns regarding the confessor's free will and the implementation of *Miranda*, and the latter to concerns regarding delay in arraignment and the implementation of *McNabb-Mallory*. While the former approach understandably tends to create confusion regarding the purpose of the two sections, the latter permits them to be analyzed separately and coherently.

The most primitive version of the first approach—the "expanded voluntariness" category—has been adopted by the Sixth Circuit, which resolved the conflict between sections (a) and (c) by holding simply that "[unnecessary delay] is one of five relevant factors which the trial judge must consider in determining voluntariness." *United States v. Mayes*, 552 F.2d 729, 734 (6th Cir. 1977). The resolution is puzzling, however, because the court also stated that "unnecessary delay, in and of itself, is not sufficient to justify suppression of an otherwise voluntary confession under 18 U.S.C. § 3501(a)." *Id.* As explained above, the absolute bar on suppressions based solely on delays in arraignment, as adopted by the Sixth Circuit, conflicts with section (c)'s command that a confession not be suppressed "solely because of delay in [arraignment]" if the confession falls within the six hour safe harbor. The Sixth Circuit's approach does, however, have the superficial benefit of apparent obedience to § 3501(a)'s command that voluntariness be the touchstone of admissibility under that section.

Yet, this obedience is nothing more than apparent; it makes "voluntariness" the touchstone only by distorting the meaning of that term. As we have already noted, the delay in arraignment (as opposed to the delay during the pre-confession period) is irrelevant to the determination whether the confession was given with a free will. Worse still, in assessing "voluntariness" *Mayes* insists upon a consideration only of *unnecessary* delay. The reasons for the delay —whether the delay was necessary or unnecessary— have no bearing, of course, on the confessor's state of mind. *See Perez*, 733 F.2d at 1031 ("[T]he government's excuses for the delay have no logical or legal relevance to the defendant's voluntariness [in giving

the confession]."); *United States v. Shoemaker*, 542 F.2d 561, 563 (10th Cir.), *cert. denied*, 429 U.S. 1004 (1976).

Notwithstanding the provisions of section (b), the problem with expanding the definition of voluntariness to include delay in arraignment is that it provides no guidance in determining how the delay is to be weighed: to order a court to consider unnecessary delay in arraignment in determining the voluntariness of a confession is to command it to engage in a wholly non-rational exercise. Because delay in arraignment (or at least the post-confession portion of that delay) does not affect the confessor's free will, a court must make explicit the purpose other than protecting that free will that is being served by suppression, at least if it is to engage in a principled analysis. When a court examines *pre-arraignment* delay and continues to insist that its determination is based solely on voluntariness, its explanation can serve only to confuse its readers and to mislead future courts. In sum, expanding the definition of "voluntary" seems to be nothing but a tautologic sleight-of-hand that hides the true basis for the suppression decision, Rule 5(a).[3]

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[3] We can best explain the nature of the "expanded voluntariness" approach by quoting from Lewis Carroll:

> "When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean—neither more nor less."
>
> "The question is," said Alice, "whether you can make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master—that's all."

Lewis Carroll, The Annotated Alice: Alice's Adventures in Wonderland & Through the Looking Glass 269 (Martin Gardner ed., Bramhall House 1960) (1871); *see generally* Bix, *Michael Moore's Realist Approach to Law*, 140 U.Penn.L.Rev. 1293 (1992).

A more sophisticated version of the first mode of analysis has been adopted by the Seventh Circuit. In *United States v. Gaines*, 555 F.2d 618 (7th Cir. 1977), that circuit avoided the pitfalls of the Sixth Circuit's approach by recognizing both that there must be some circumstances in which delay in arraignment alone justifies suppression and that such suppression must be grounded on the interests incorporated in Rule 5(a), not on the interest in preventing coerced confessions, *see id.* at 623-24. The court did not, however, hold that all unreasonable delays in arraignment (outside the safe harbor period) require suppression of the confession (the *McNabb-Mallory* rule), but rather held that whether delay warranted suppression depended upon "the exercise of such judicial discretion depend[ing] upon a congeries of factors, including such elements as the deterrent purpose of the exclusionary rule, the importance of judicial integrity, and the likelihood that admission of the evidence would encourage violations of the Fourth Amendment." *Id.* at 623-24. The Seventh Circuit thus appears to have attempted to reconcile sections (a) and (c) through a compromise under which a Rule 5(a) volation alone may render a confession inadmissible, but does not necessarily do so.

The alternative approach to § 3501 recognizes that, while sections (a) and (c) are facially incompatible, they can best be understood by construing section (a) to address concerns regarding a confessor's free will and section (c) to address concerns regarding delay in arraignment. Such a construction is most consist-

ent with the legislative history, which demonstrates: (1) that section (a) was enacted in light of congressional concern over the Supreme Court's holding in *Miranda v. Arizona*, 384 U.S. 436 (1966), that confessions should be suppressed in certain circumstances without finding "the defendants' statements to have been involuntary in traditional terms," *id.* at 457. *See United States v. Robinson*, 439 F.2d 553, 562-63 (D.C. Cir. 1970); *id.* at 574 n.18 (McGowan, J., dissenting); Senate Report (Judiciary Committee) No. 1097, *reprinted in* 1968 U.S. Code Cong. & Admin. News 2112, 2123-40, 2282,[4] and (2) that section (c) was appended to the statute to address the *McNabb-Mallory* rule, *see* 114 Cong. Rec. 14,184-86. Given this history, and the fact that pre-arraignment delay is the exclusive subject of section (c), the approach concludes that it is *that* section that incorporates Congress' intent with regard to the admission of confessions made during an unreasonable delay in arraignment. As the Second Circuit has stated it,

> the additon of subsection (c) on the Senate floor effectively codified a limited *McNabb-Mallory* rule. Stated another way, section 3501 legislatively overruled the *McNabb-Mallory* rule only to the extent of (1) unreasonable pre-arraignment, pre-confession delays of less than six hours and (2) reasonable delays in excess of six hours.

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[4] Congress' attempt to address *Miranda* has been held not to overrule that decision, as such a result would be of questionable constitutionality, *see, e.g., Robinson*, 439 F.2d at 574 n.18 (McGowan, J., dissenting), but rather to guide the voluntariness inquiry under certain circumstances, *see, e.g.*, 439 F.2d at 562 & n.11.

Perez, 733 F.2d at 1035. Accordingly, a confession outside of the section (c) safe harbor is subject to the *McNabb-Mallory* rule, which mandates exclusion if the delay in arraignment is unreasonable. This approach is recommended by most commentators, *see, e.g.*, 3 J. Wigmore, Evidence § 862(a), at 623 (Chadbourn rev. 1970) (stating that § 3501 retains the *McNabb-Mallory* rule with regard to confessions obtained outside of the section (c) safe harbor); 8 J. Moore, Moore's Federal Practice ¶ 5.02[2], at 5-13-5-15 (2d ed. 1992) (same), and has been adopted by the Second and District of Columbia Circuits, *see Perez*, 733 F.2d at 1035; *United States v. Robinson*, 439 F.2d 553, 563-64 (D.C. Cir. 1970).

The leading Ninth Circuit decision regarding pre-arraignment delay is *United States v. Halbert*, 436 F.2d 1226 (9th Cir. 1970), which bears some similarities to the Sixth Circuit's "expanded-voluntariness" approach. In *Halbert*, we stated that non-safe harbor confessions "are admissible if voluntary, although the trial judge under subsection (b) may take into account delay in arraignment in his determination of voluntariness." *Id.* at 1237. *Halbert* differed from the Sixth Circuit's approach in one important aspect, however. Although it attempted to incorporate pre-arraignment delay within a "voluntariness" determination, it recognized that "[d]iscretion remains in the trial judge, under subsection 3501(b), to exclude confessions as involuntary solely because of delay in arraignment, during which a confession is given, that exceeds six hours." *Id.* at 1234. Our difference with the Sixth Circuit on this point sharpened as we reiterated our position on numerous occasions. *See, e.g., United States v. Fouche*, 776 F.2d 1398,

1406 (9th Cir. 1985) (stating that "the district court has the authority to exclude the [non-safe harbor] confession as involuntary, and may do so solely because of the pre-arraignment delay"); *Manuel*, 706 F.2d at 913 (9th Cir. 1983) ("Section 3501(c), by implication, provides that unreasonable pre-arraignment delay can provide the sole basis for a finding of involuntariness, if the delay exceeds six hours."). Thus, in a series of cases we have made it clear that suppression can be based on concerns other than the confessor's free will, although we did not say so explicitly. *Cf. United States v. Edwards*, 539 F.2d 689, 691 (9th Cir.) (finding that a confession was "voluntary" because, *inter alia*, "the delay in arraignment was caused solely by a shortage of personnel and vehicles to transport the suspect a distance of 125 miles to Tucson, the situs of the nearest available magistrate"), *cert. denied*, 429 U.S. 984 (1976).

In *United States v. Wilson*, 838 F.2d 1081 (9th Cir. 1988), we solidified our approach by making explicit the purposes for which delay in arraignment is considered in a § 3501 suppression hearing. In *Wilson*, we reversed the district court and ordered suppression of a confession obtained during a lengthy pre-arraignment delay, a delay extended in part in order to allow police officers time to interrogate the defendant. In finding the confession inadmissible, we did not state that the confessor's will had been overcome, but rather ordered suppression because

> [t]he purposes embedded in § 3501—to prevent confessions extracted due to prolonged pre-arraignment detention and interrogation, and *to supervise the processing of defendants from as*

> *early a point in the criminal process as is practicable*—are frustrated when the arraignment of a defendant who has been in custody for more than six hours is further delayed for no purpose other than to allow further interrogation of the defendant. If we countenance the police procedure followed here, we give officers a free hand to postpone any arraignment until a confession is obtained. That was not the legislative intent behind § 3501.

Id. at 1087 (emphasis added). *Wilson* thus makes explicit that a confession may be suppressed in order to serve the prophylactic purpose of discouraging officers from unnecessarily delaying arraignments (i.e., from volating Rule 5(a)) as well as to prevent admission of an involuntary confession. It also serves to bring us closest to the approach used by the Seventh Circuit.[5]

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[5] The dissent recites a long list of successors to *Halbert* in an unsuccessful attempt to demonstrate that in the past we have reviewed arraignment delays in excess of six hours exclusively for involuntariness, and not for unreasonableness. As we note elsewhere, *United States v. Edwards*, 539 F.2d 689 (9th Cir. 1976), *United States v. Manuel*, 706 F.2d 908 (9th Cir. 1983), and *United States v. Stage*, 464 F.2d 1057 (9th Cir. 1972) support the approach taken in *Wilson*. See discussion at [15a-16a; 18a] *supra*. *United States v. Mandley*, 502 F.2d 1103 (9th Cir. 1974), the only other case cited by the dissent, confined its analysis of § 3501 to quoting *Halbert*, and shed no light on the latter's use of the term "voluntariness". Moreover, while questioning our faithfulness to prior Ninth Circuit precedent, the dissent does not attempt to explain how its approach is consistent with *United States v. Sotoj-Lopez*, 603 F.2d 789 (9th Cir. 1979) (per curiam) (discussed below) and *Stage*.

Interestingly, despite our long line of cases following *Halbert*, we have never expressly chosen between an approach that requires suppression of non-safe harbor confessions if the court determines the delay to have been unreasonable (*McNabb-Mallory*) and an approach that allows admission of some non-safe harbor confessions given during an unreasonable delay in arraignment if the court believes that, on balance, suppression is not warranted. Although in *Halbert* we stated that the statute does not require that all confessions falling outside the safe harbor should be suppressed, *see id.* at 1232-33, that statement does not resolve the question. *McNabb-Mallory* and Rule 5(a) only require the supression of non-safe harbor confessions given during *unreasonable* delays in arraignment, not all non-safe harbor confessions.[6] Therefore, *Halbert* is not dispositive of the

[6] In this regard, it is important to note that under § 3501(c), not all reasonable delays *extend* the safe harbor, only those relating to difficulty transporting the defendant to the nearest magistrate, *see Wilson*, 838 F.2d at 1085 (Section 3501(c) "excuses delays for more than six hours *only* when such delay 'is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.' "). However, some delays that do not come within the safe harbor may be justified based on legitimate reasons other than difficulty in transportation; in those instances, the delay is deemed reasonable and there is no violation of Rule 5(a). *See, e.g., Evans v. United States*, 325 F.2d 596, 603-04 (8th Cir. 1963) (holding that Rule 5(a) was not violated by a 12 hour delay in arraignment incurred in order to search for stolen money), *cert. denied*, 377 F.2d 968 (1964); *see also supra* at [4a] (discussion test of reasonableness under *McNabb-Mallory*). Confessions obtained during such periods of "reasonable" delay are not excludible under *McNabb-Mallory*.

question whether the *McNabb-Mallory* bright line rule is applicable to non-safe harbor confessions.[7] Nevertheless, it is fair to state that most of our cases are more consistent with the Seventh Circuit balancing test than with the Second Circuit *McNabb-Mallory* bright line approach. *Compare Gaines*, 555 F.2d at 623 (7th Cir.) (asserting that its approach was consistent with *Halbert*) *with Perez*, 1033-34 (2d Cir.) (declining to follow *Halbert* but asserting that "the Ninth Circuit has not adhered consistently to the *Halbert* view").

There are at least two cases in which we followed the *McNabb-Mallory* approach. *See United States v. Soto-Lopez*, 603 F.2d 789 (9th Cir. 1979) (per curiam); *United States v. Stage*, 464 F.2d 1057 (9th Cir. 1972) (per curiam). In those cases, we suppressed non-safe harbor confessions on the basis of *McNabb-Mallory* without discussing *Halbert*. *See Sotoj-Lopez*, 603 F.2d at 790-91; *Stage*, 464 F.2d at 1057-58. On the basis of these post-*Halbert* cases, it might be possible to conclude either that the law of the Ninth Circuit is that *McNabb-Mallory* applies to non-safe harbor confessions or that we have an intra-circuit conflict. We need not resolve the matter, however, for we conclude that the confession before us must be excluded under either approach; thus resolution of any possible conflict is unnecessary. *See United States v. Whitehead*, 896 F.2d 432, 434 (9th Cir.), *cert. denied*, 111 S. Ct. 342 (1990); *United States v. Sotelo-Murillo*, 887 F.2d 176, 179 (9th Cir. 1989). In addition, we note that the conflict may be more apparent than real. Under *Sotoj-*

[7] Indeed, it is interesting that we were careful in *Halbert* to note that the delay did *not* violate Rule 5(a). *See* 436 F.2d at 1230.

Lopez, a court examines the delay in arraignment (if it falls outside of the safe harbor) to determine if it is unreasonable; only if the delay is unreasonable does it exclude the confession. Under *Halbert*, a court considers the delay in arraignment (again assuming that it falls outside the safe harbor) to determine whether or not it is the sort of delay that warrants suppression in light of a number of factors, including the prophylactic purpose "embedded" in § 3501. *See Wilson*, 838 F.2d at 1087. A strong argument can be made that the second inquiry also hinges on whether the delay is reasonable—that *Halbert-Wilson* simply provides an explicit set of criteria for determining reasonableness. In any event, as we have stated, we will not resolve this question as we find the result in this case to be the same whether we rely on *Halbert-Wilson* or *Sotoj-Lopez*.

III

In evaluating the admissibility of Alvarez-Sanchez's confession, we note that it did not occur during the § 3501(c) safe harbor period. It was obtained far longer than six hours after his arrest. Alvarez-Sanchez was taken into local custody on Friday, did not confess to federal authorities until Monday afternoon, and was not arraigned until Tuesday morning. Thus, the combined delay well exceeds the § 3501(c) six-hour safe harbor. *See United States v. Fouche*, 776 F.2d 1398, 1406 (9th Cir. 1985) (stating that "pre-arraignment delay caused by local and federal officials should be considered cumulatively under section 3501(c)").[8] We find no reason for extending the

[8] The government suggests that *Halbert* stands for the proposition that pre-arraignment delay by local and federal officials should be aggregated only when the defendant can show evidence of collusion between local and federal authorities. *Halbert* stands for no such proposition. Indeed, the court suggests the opposite rule, *see id.* at 1231 ("It can be argued that § 3501 removed the necessity of considering 'collusive working agreements.' "), and in any case expressly refrains from deciding the question, *see id.* at 1231, 1232 n.4. *Fouche*, however, does reach the issue and makes clear that pre-arraignment delay should always be aggregated.

safe harbor period as there was no claim of difficulty in transporting the defendant to the nearest magistrate. Thus, Alvarez-Sanchez's confession clearly falls outside the safe harbor, a point that the government has not contested.

IV

We now turn to the question of whether the confession should be excluded. Under the *McNabb-Mallory* approach followed in *Sotoj-Lopez*, the answer is clear. We need only look to one part of the delay in order to reach our conclusion. Alvarez-Sanchez's arraignment was delayed from Monday afternoon to Tuesday morning specifically to provide federal officers with time to interrogate him. Such a delay is one of the most patent violations of Rule 5(a) and suppression is required on the basis of that delay alone—irrespective of the lengthy delay that occurred between Friday and Monday. *See Upshaw v. United States*, 335 U.S. 410, 414 (1948); *Ginoza v. United States*, 279 F.2d 616, 621 (9th Cir. 1960) (en banc) (requiring suppression of a confession obtained during a delay "designed primarily for the purpose of enabling the officers to secure or to obtain the [confession]").

Under *Halbert*, we reach the same result. *Halbert* expressly provides that in some cases confessions should be suppressed solely on the basis of pre-arraignment delay. This is one of those cases. Because § 3501 has "embedded" within it the goal of speedy arraignments, *see Wilson*, 838 F.2d at 1087, the avoidable and deliberate delay engaged in here, after a long period of custody, for the sole purpose of interrogating the arrestee requires suppression of the confession.[9] Under the circumstances presented here, allowing police officers to interrogate an arrestee rather than to arraign him would encourage violations of Rule 5(a)—because it would permit the prosecution to profit by its wilful violations. As we stated in *Wilson*, "[i]f we countenance the police procedure followed here, we give officers a free hand to postpone any arraignment until a confession is ob-

[9] The government argues that finding the delay unreasonable here will establish a duty to arrest a defendant as soon as probable cause is established, in contradiction to *Hoffa v. United States*, 385 U.S. 293, 309-10 (1966). *Hoffa*, however, rejected a duty to arrest *and take into custody* a suspect once probable cause is established. It did not address the duty to arraign speedily a defendant *who is already in custody* and therefore a subject of the concerns expressed in 18 U.S.C. § 3501 and Fed. R. Crim. P. 5. The government does not deny the existence of a duty to arraign speedily a detained suspect. *See* Fed. R. Crim. P. 5 ("An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate."). It only denies the duty to arraign speedily a suspect who is in the state custody. *Fouche*, as has already been explained, rejects the government's position.

tained." *Id.* Accordingly, Alvarez-Sanchez's confession must be suppressed.[10]

Since there is no contention that admitting the confession was harmless, *cf. Arizona v. Fulminante*, 111 S. Ct. 1246, 1266 (1991) (Kennedy, J., concurring) (suggesting that, because of "the indelible impact a full confession may have on the trier of fact," a confession is seldom, if ever, harmless), and the evidence, including the erroneously admitted confession, was sufficient to support the verdict, the judgment of the district court must be vacated, the order denying the defendant's motion to suppress his confession must be reversed, and the case must be remanded to the district court for further proceedings in conformity with this opinion.

[10] Finally, we note that even were we to apply all the factors set forth in § 3501(b), we would conclude that the confession should be excluded. The first factor, delay in arraignment, weighs heavily in favor of suppression as the delay, from Friday to Tuesday, was almost four days in length. The fifth factor also weighs in favor of suppression because Alvarez-Sanchez was not represented by counsel. The second factor, whether the defendant understood the nature of the charges against him, does not weigh on either side, as the district court made no findings in this regard, although even if we assume Alvarez-Sanchez did understand, our result would be unaltered. The third and fourth factors weigh slightly in favor of admission because Alvarez-Sanchez waived his *Miranda* rights; however, the weight of these factors is greatly diminished because the waiver occurred only after he had been detained for over three days. *See Wilson*, 838 F.2d at 1087. Were we to balance all these factors, along with the unreasonableness of the delay in arraignment, we would conclude that suppression of the confession is required.

VACATED, REVERSED, AND REMANDED FOR FURTHER PROCEEDINGS.

PRICE, Senior District Judge, dissenting:

I respectfully dissent from the majority opinion in this matter.

After conviction by trial, the defendant appeals the order of the district court that denied his motion to suppress statements made to federal officers obained in violation of 18 U.S.C. § 3501. The facts as found and relied upon by the district court are as follows.

FACTS AND PROCEDURAL HISTORY

Defendant Pedro Alvarez-Sanchez was arrested by Los Angeles Sheriff's Deputies on narcotics charges on August 5, 1988, during the execution of a search warrant on defendant's residence. It is not clear whether the Los Angeles Sheriff's Department was told that the Los Angeles District Attorney's Office would decline prosecution (Declaration of Los Angeles Sheriff's Department Deputy Abraham Hernandez), or if the case was never presented to the District Attorney for a prosecutorial decision (Los Angeles Sheriff's Department Detective John McCann). However, because counterfeit money totaling $2,260.00 was recovered from defendant's residence, the Secret Service was notified on Monday, August 8, 1988.

At about 11:30 a.m. on August 8, 1988, defendant, while still in state custody, was interviewed by United States Secret Service Special Agents Lipscomb and Bozzuto, and Los Angeles Sheriff's Department Deputy Abraham Hernandez, the latter being fluent in Spanish. Defendant was advised of, and agreed to waive, his *Miranda* rights, and confessed to knowingly possessing counterfeit money. Defendant was taken into custody by the special agents in the afternoon of August 8, 1988.

After returning to the United States Courthouse in Los Angeles, California, the arresting officers proceeded to put the defendant through the necessary booking procedures. By the time they had completed these procedures, they were told that the magistrate's calendar was filled, and that the defendant could not be brought before a magistrate on August 8, 1988. Defendant was brought before the magistrate on the morning of August 9, 1988. An indictment was subsequently returned against the defendant charging him with possession of counterfeit money with the intent to defraud in violation of 18 U.S.C. § 472. He was convicted.

We are mandated to review the claimed violation of 18 U.S.C. § 3501 *de novo*. *United States v. Wilson* 883 F.2d 1081, 1083 (9th Cir. 1988).

DISCUSSION

At the time this case arose, Title 18 of the United States Code § 3501 read as follows:

> (a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (3) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that

the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

(c) In any criminal prosecution by the United States or by the District of Columbia, a confes-

sion made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: Provided, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(e) As used in this section, the term "confession" means any confession of guilt of any crim-

inal offense or any self-incriminating statement made or given orally or in writing.

18 U.S.C. § 3501 (emphasis added).[1]

This section was passed to ameliorate the effect of *Mallory v. United States*, 354 U.S. 449, 1 L.Ed.2d 1479, 77 S.Ct. 1356 (1957). The legislative history reveals the congressional view of the effect that *Mallory* was having on criminal prosecutions:

> Voluntary confessions have been admissible in evidence since the early days of our Republic. These inculpatory statements have long been recognized as strong and convincing evidence—often called the best evidence of guilt. In *Mallory v. United States*, 77 S.Ct. 1356, 354 U.S. 449 (1957), the U.S. Supreme Court declared inadmissible voluntary confessions made during a period of unnecessary delay between the time of arrest and the time the suspect is taken before a committing magistrate. The case of *Alston v. United States*, 348 F.2d 72 (D.C. Cir. 1965), is indicative of the illogical and unrealistic court decisions resulting from the application of the *Mallory* rule. The Honorable Alexander Holtzoff, U.S. district judge for the District of Columbia, testified before the subcommittee as follows:
>
> > On the other hand, the District of Columbia circuit takes an extreme position and practically holds that an arrested person must be taken to a magistrate immediately,

[1] The bill as originally passed, referred to "commissioners." The word "magistrate" was inserted wherever the word "commissioner" originally appeared.

> > even in the dead of night, subject to necessary time to make a record of the arrest, fingerprinting the defendant, and similar mechanical processes. This is illustrated by the case of *Alston v. United States*, 121 U.S.App.D.C. 66, 348 F.2d 72, in which the conviction of a self-confessed murderer whose guilt was not in dispute, was reversed. The facts are startling. The defendant was brought to police headquarters at 4:30 a.m. He was questioned by the police for about 5 minutes and then immediately confessed on the advice of his wife who had accompanied him with the police. It was held by the court of appeals that the arresting officers should have taken the defendant before a committing magistrate immediately and that the questioning, even for 5 minutes, was not permissible—the conviction was reversed. It is my understanding that the indictment thereafter was dismissed on the motion of the U.S. attorney in view of the fact that he felt that without the confession he did not have sufficient evidence to convict (Hearings, at 260-61).
>
> The rigid, mechanical exclusion of an otherwise voluntary and competent confession is a very high price to pay for a "constable's blunder."

S.Rpt. No. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 2112, 2124.

In *United States v. Halbert*, 436 F.2d 1226 (9th Cir. 1970), this court held that a voluntary confession given more than six hours after the defendant

was taken into custody by state officer was admissible.

The pertinent facts were as follows:

1. Defendant Halbert was arrested by state officers in the afternoon of November 11, 1969. He was booked in the Bowie, Arizona jail.

2. On November 12, between 9 and 10 a.m., state officials notified the FBI of the arrests and possible Dyer Act violation. The FBI received confirmation that the car in which the defendant had been arrested had been stolen in California.

3. On November 13, 1969, an FBI agent interviewed Halbert and obtained his confession at about 3:26 p.m.

4. The United States Attorney requested the FBI to determine if local authorities in Los Angeles would prosecute the defendant. They declined and so notified the Arizona FBI agents on November 13, 1969.

5. On Friday, November 14, 1969, FBI agent Bogley was assigned other routine duties and did not present the matter to the U.S. Attorney's Office in Arizona until Monday, November 17, 1969. A complaint was filed, and a warrant was issued. Halbert first appeared before the U.S. Magistrate on November 17, 1969.

The appellate panel's summary continued:

> Halbert moved to suppress the confession given in the interview on November 13 with Agent Bagley on the grounds that it was obtained in violation of (1) the Fifth amendment and Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), (2) Rule 5 of the Federal Rules of Criminal Procedure and Mallory v. United States, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957), and (3) 18 U.S.C. § 3501.

The district court granted the motion. The district court found (1) that a proper Miranda warning had been given, (2) that the confession was voluntary under 18 U.S.C. § 3501(b), but (3) that the delay between the state arrest and the confession and delay in holding a committing hearing was not reasonable under 18 U.S.C. § 3501(c). The precise finding on the latter issue was:

> "Not only was this confession not obtained within six hours of the arrest or detention, but the delay in holding defendant's committing hearing cannot be excused in light of 'the means of transportation and the distance to be traveled to the nearest such available magistrate or other officer.' "

Id. at 1226.

The *Halbert* panel held that 18 U.S.C. § 3501(c) does not automatically render *all* confessions made after 6 hours of detention inadmissible:

> Thus, subsection 3501(b) instructs the trial judge to consider delay in arraignment in determining the voluntariness of a confession but leaves him with a great deal of discretion on what to make of it. In this context, subsection 3501(c), in providing that confessions shall not be inadmissible solely because of delay in arraignment, if otherwise voluntary and given within six hours of arrest, merely removes some of the discretion given to the trial judge under

subsection 3501(b) in determining voluntariness. Discretion remains in the trial judge, under subsection 3501(b), to exclude confessions as involuntary solely because of delay in arraignment, during which a confession is given, that exceeds six hours.

This construction is consistent with the language of section 3501 and a scheme under which the admissibility of confessions turn on voluntariness. The integration, however, is not perfect. The effect of the proviso of subsection 3501(c) is to remove discretion from the trial judge by requiring him to admit a confession, otherwise voluntary, given more than six hours of arrest during a delay in arraignment if the delay was reasonable considering problems in transporting the defendant to the magistrate.

One must conclude then that subsection 3501(c) was intended to make voluntary confessions within six hours after arrest, clearly admissible without reference to delay. The provision as to confessions made more than six hours after arrest pinpointed an excuse for delay, caused by transportation and distance difficulties. After the express statements in § 3501(a) that the confession "shall be admissible in evidence if voluntarily given," and the statement in subsection 3501(b) that in determining the voluntariness the court shall take into account "the time elapsing between arrest and arraignment of the defendant making confession, if it was made after arrest and before arraignment," we cannot say that Congress intended by the provision in subsection 3501(c) to undo all it had done with

> the preceding subsections. The legislative history which we review hereafter clearly confirms our view, and we think it would be error to reach a different interpretation.

Id. at 1234.

The *Halbert* panel then discussed the legislative history and concluded that it supported their interpretation. The *Halbert* panel concluded:

> We conclude that confessions given more than six hours after arrest during a delay in arraignment are admissible if voluntary, although the trial judge under subsection 3501(b) may take into account delay in arraignment in his determination of voluntariness. The district court here found Halbert's confession voluntary under subsection 3501(b). This conclusion of the district court was correct. The confession was given two days after Halbert's arrest and he was, as discussed above, given the *Miranda* warnings. There was no evidence that he was subjected to oppressive police practices prior to his confession or that the delay between arrest and confession contributed in any way to the confession.
>
> The delay *after* the confession and before his federal arraignment obviously had no effect on the prior confession and would not render it inadmissible. United States v. Mitchell (1944), 322 U.S. 65, 64 S.Ct. 896, 88 L.Ed.2d 1140, United States v. Campbell (9th Cir. 1970), 431 F.2d 97, note 2.

Id. at 1237.

An examination of the cases which have involved an application of 18 U.S.C. § 3501 since *Halbert* is equally instructive.

In *United States v. Stage*, 464 F.2d 1057 (9th Cir. 1972), the defendant was arrested on August 20, 1970. Federal agents began questioning him soon after his arrest and gave Stage his *Miranda* warning on August 20, 1970. Stage indicated that he did not want to make any statements until he talked to an attorney. No attorney was ever furnished. On August 25, 1970, after a continued interrogation by state and federal officers, Stage filed a "waiver of rights" and confessed to a Dyer Act violation. His conviction was reversed and the case was remanded with instructions to dismiss the indictment.[2]

In *United States v. Mandley*, 502 F.2d 1103 (9th Cir. 1974), the defendant was arrested by state officers on December 26, 1973 for a parole violation. Wanted by the FBI, a federal hold was placed upon him. When his parole hearing occurred on January 7, 1974, the disposition of the state parole charge was postponed until disposition of the federal charges. On January 19, 1974, federal agents interviewed Mandley. He signed a waiver of his *Miranda* rights and confessed, following a two hour interview. Mandley was taken before a magistrate on January 14, 1974, nineteen days after his initial arrest, and seven days after the state hearing was suspended. The Ninth Circuit panel held that the confession was admissible, stating:

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[2] One member of the panel dissented, but agreed that the confession of Stage was not admissible.

> Prior to enactment of 18 U.S.C. § 3501 appellant's contentions could well have had merit under Rule 5, Federal Rules of Criminal Procedure, and Supreme Court decisions in McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608, 37 L.Ed. 819 (1943), and Mallory v. United States, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957). Section 3501 has, however, substantially changed the law.

United States v. Mandley, 502 F.2d at 1105.

In *United States v. Edwards*, 539 F.2d 689 (9th Cir. 1976), a rape occurred on an Indian reservation in Arizona on November 1, 1975. After a preliminary investigation, the United States Attorney authorized prosecution of the defendant. The FBI notified the Bureau of Indian Affairs that it could make the arrest. After his arrest on November 4, 1975, the defendant signed a waiver of his rights and an admission was obtained approximately 7 hours after being taken into custody and before being taken before a magistrate. The panel affirmed the trial court's finding that the confession was volunary.

In *United States v. Manuel*, 706 F.2d 908 (9th Cir. 1983), the following events occurred. On August 3, 1981, the body of one Howard was found on an Arizona road. On August 4, 1981, Manuel and two other suspects were arrested. All three were heavily intoxicated, and a decision was made to allow the defendants to sleep off the effects of the alcohol. On August 5, 1981, Manuel was questioned by FBI Agent Fish, starting shortly after 8:00 a.m. After being instructed as to his *Miranda* rights, Manuel confessed his role in the killing of Howard. Following this interview, the United States Attorney au-

thorized prosecution of Manuel, but did not authorize arrest. The Indian tribe declined to prosecute, and on November 21, 1981, Manuel was indicted. The appellate panel affirmed the trial court's determination that the confession was admissible at trial, stating:

> We find nothing in the record that would exclude Manuel's confession. The delay between his arrest and interrogation was reasonable under the circumstances. Uncontradicted testimony showed that Manuel was very heavily intoxicated when arrested on the afternoon of August 4. Questioning him in such a condition would have been much more likely to produce an unfair and involuntary confession than the procedure actually used. The tribal police provided Manuel with a meal and with sleeping accommodations so that he could regain sobriety. Although we do not sanction delay of any kind in bringing an accused person before a magistrate, delay engendered by such humanitarian motives can hardly be deemed unreasonable per se. *See United States v. Isom*, 588 F.2d 858, 862 (2d Cir. 1978); *United States v. Bear Killer*, 534 F.2d 1253, 1257 (8th Cir.), *cert. denied* 429 U.S. 846, 97 S.Ct. 129, 50 L.Ed.2d 118 (1976). Under the circumstances of this case, the delay did not render the appellant's confession involuntary.
>
> Apart from the delay, appellant does not seriously contend that the incriminating statements he made on the morning of August 5 were involuntary. The district court specifically found the confession to be voluntary. We cannot say that this finding was incorrect; it was supported by evidence that FBI agent Fish carefully explained to Manuel his *Miranda* rights prior to beginning the questioning, which immediately elicited Manuel's confession. We find that the district court properly applied the standard of 18 U.S.C. § 3501(b) to admit Manuel's confession, *see United States v. Mandley*, 502 F.2d 1103, 1105 (9th Cir. 1974); *Halbert*, 436 F.2d at 1237.

In *United States v. Wilson*, 838 F.2d 1081 (9th Cir. 1988), the Navajo Tribal Police Department received a call on May 3, 1985 regarding an unconscious child at the Public Health Service Hospital. The child's mother told the Tribal Police her common law husband had spanked the child with a shoe. The FBI in Gallup, New Mexico was notified. The FBI instructed the Navajo police to get a written statement from the mother and to keep the FBI informed. Wilson was arrested by tribal officers later the same day. He was placed in solitary confinement and special security precautions were taken to monitor him frequently during his custody upon their arrival at the tribal jail.

Sgt. Hawkins told the FBI agents that Wilson was to be arraigned on the tribal charges that day. He further stated that if the court started taking arraignments during their interview, he would make arrangements to take Wilson before the judge himself after the agents had finished the interview.

FBI Agents Babcock and Coffman started their interview sometime between 1:00 and 1:30 p.m. on May 10, 1985. The court's summary of this interview is as follows:

Agents Babcock and Coffman spoke with Wilson for more than two hours. Preliminary questioning revealed that Wilson had only a seventh grade education and had been arrested only on tribal or drinking offenses. Agent Babcock then read Wilson his *Miranda* rights, and asked Wilson to read them to himself, then aloud. Wilson declined to have his rights read to him in the Navajo language. He said he understood his rights and would talk to the agents about his son. The agents questioned Wilson about Melvin for approximately 1 hour and 42 minutes. Wilson thrice denied abusing his son. Agent Babcock told Wilson that he was lying and that it would be easier for him if he "got it off his chest." Babcock then asked Wilson whether he had been a victim of child abuse himself. At this point, Wilson broke down and started crying. He then confessed to having abused Melvin.

> The FBI concluded its questioning at approximately 4:00 p.m., by which time the tribal court, which met upstairs in the same building, had completed the day's arraignments. Because he was being questioned, Wilson missed the regularly scheduled arraignment calendar. After Wilson confessed, Sgt. Hawkins took him up to the judge's chambers to be arraigned specially.

United States v. Wilson, 838 F.2d at 1083.

The *Wilson* panel reversed the trial court's determination that Wilson's confession was voluntary stating:

> The government's reliance on the waiver of *Miranda* rights becomes weaker as the period

> of pre-arraignment detention increases. If unreasonable delay in excess of six hours can itself form the basis for a finding of involuntariness, that same delay may also suggest involuntariness of the *Miranda* waiver. *See Frazier v. United States*, 419 F.2d 1161, 1167 (D.C.Cir. 1969) (noting that the government's "already 'heavy burden' of showing effective waiver increases with the delay between arrest and confession).
>
> Given our holding in *Fouche* and the long delay which undermines a valid waiver of Wilson's *Miranda* rights, we cannot say that Wilson's apparent waiver of his rights to remain silent and to have an attorney present will overcome the other factors which support a finding of involuntariness. The purpose embedded in § 3501 —to prevent confessions extracted due to prolonged pre-arraignment detention and interrogation, and to supervise the procession of defendants from as early a point in the criminal process as is practicable—are frustrated when the arraignment of a defendant who has been in custody for more than six hours is further delayed for no purpose other than to allow further interrogation for the defendant. If we countenance the police procedure followed here, we given [*sic*] officers a free hand to postpone any arraignment until a confessions [*sic*] obtained. That was not the legislative intent beyond [*sic*] § 3501. It was error to deny the suppression motion.

Id. at 1087.

The *Halbert* analysis, and the cases that have followed make it clear that 18 U.S.C. § 3501(a), (b),

and (c) should be construed together. The failure to bring a defendant before a magistrate within six hours of his or her arrest does not, in and of itself, render a confession given in the interim inadmissible. The Court's inquiry should center on all of the facts and circumstances, surrounding the confession to determine if it was voluntarily given.

In the case before the Court, there is no evidence that any delay in bringing Alvarez before the magistrate was used to lengthen the interrogation of this defendant. Further, the defendant knew the nature of the charges pending against him.

As the defendant was being booked, and not in response to any specified question, he asked, "is this about the counterfeit money?" The defendant admitted possession of the counterfeit money shortly after the beginning of the interrogation by Special Agents Lipscomb and Buzzuto of the Secret Service.

I would affirm the ruling of the trial court denying defendant's motion to suppress, and would affirm defendant's conviction.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CR 88-671 (CBM)

UNITED STATES OF AMERICA, PLAINTIFF

v.

PEDRO ALVAREZ-SANCHEZ, DEFENDANT

ORDER

[Filed Oct. 2, 1988]

This matter is before the Court on defendant's motion to suppress statements made in violation of *Miranda* and for an evidentiary hearing on the voluntariness of defendant's statements, pursuant to 18 U.S.C. 3501.

FACTS AND PROCEDURAL HISTORY

Defendant Pedro Alvarez-Sanchez was arrested by Los Angeles Sheriff's deputies on narcotics charges on August 5, 1988 during the execution of a search warrant on defendant's residence. It is not clear whether the Los Angeles Sheriff's Department was told that the Los Angeles District Attorney's Office would decline prosecution (Declaration of Los Angeles Sheriff's Deparment Deputy Abraham Hernan-

dez) or if the case was never presented to the District Attorney for a prosecutorial decision (Los Angeles Sheriff's Department Detective John McCann), but because counterfeit money (totaling $2,260.00) was recovered from defendant's residence, the Secret Service was notified.

On August 8, 1988, defendant, while still in state police custody, was interviewed by United States Secret Service Special Agents Paul J. Lipscomb and Bozzuto and Los Angeles Sheriff's Department Deputy Abraham Hernandez, the latter apparently fluent in Spanish. The defendant was advised of, and agreed to waive, his *Miranda* rights and confessed to knowingly possessing counterfeit money. Defendant was taken into custody by the special agents in the afternoon of August 8 and was brought before the magistrate in the morning of August 9. An indictment was subsequently returned against the defendant charging him with possession of, with the intent to defraud, counterfeit money, in violation of 18 U.S.C. 472.

CONTENTIONS

Defendant bases his motion to suppress and for an evidentiary hearing upon two contentions: (1) that the defendant's confession was made without a voluntary and knowing waiver of his constitutional rights in violation of *Miranda*; and (2) that the delay between arrest and arraignment, during which the confession was made, renders the confession inadmissible under 18 U.S.C. 3501(c).

The government contends that defendant's statements were the result of a voluntary, intelligent and knowing waiver of his rights and that defendant's statements are not rendered inadmissible under 18

U.S.C. 3501(c) because delay in arraignment is not conclusive on the issue of voluntariness of a confession, but must be considered in light of the totality of the circumstances.

DISCUSSION

A. *Voluntariness, in general*

In order to introduce statements obtained from a defendant during custodial interrogation, the government must advise the accused of his right to remain silent and of his right to have counsel present during questioning. *Miranda v. Arizona*, 384 U.S. 436 (1966); *Fare v. Michael*, 442 U.S. 707 (1979). One precondition for a voluntary custodial confession is a voluntary and knowing waiver of *Miranda* rights. *U.S. v. Heredia-Fernandez*, 756 F.2d 1412 (9th Cir. 1985).

When the voluntariness of a statement is brought into question, due process requires that the trial judge determine the voluntariness of the confession outside the presence of the jury. *Jackson v. Denno*, 378 U.S. 368 (1964).

18 U.S.C. 3501(b) sets forth some of the factors that should be considered in making this determination:

> The judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was sus-

pected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The government bears the burden of establishing, by a preponderance of the evidence, that an inculpatory statement by the defendant was voluntarily made. *Lego v. Twomey*, 404 U.S. 477 (1972).

In the instant case, the defendant was apparently advised of his rights in Spanish, both orally and by way of a written card, by Deputy Hernandez in the presence of Special Agents Lipscomb and Bozzuto. Defendant verbally indicated his understanding of these rights and his arrest to waive them and also signed a written waiver thereto. Defendant now contends that he did not understand his rights (both in terms of their significance and in terms of the language in which they were given), and that his waiver, accordingly, was not voluntary and knowing.

The determination of voluntariness depends upon the totality of the circumstances surrounding the taking of the statement and how these affected the individual defendant, *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973), and must be made considering the background, experience and conduct of the accused. *U.S. v. Rodriguez-Gastelum*, 569 F.2d 482, 488 (9th Cir. 1972), *cert. denied*, 436 U.S. 919 (1973).

Application of these factors to the instant case mandates the conclusion that defendant's statements during interrogation were, in fact, voluntarily, intelligently and knowingly made.

Clearly, the fact that the defendant orally affirmed his waiver and signed a written waiver does not, in itself, establish the voluntariness of a waiver. However, the defendant's conduct surrounding the statements—i.e., his prior experience as a police officer in Mexico, the conversation between defendant and Deputy Hernandez appeared to be relaxed, defendant appeared to understand Deputy Hernandez, and when questioned in detail, defendant said he didn't want to say anything more—establishes the voluntariness of a waiver.

B. *Voluntariness and Delay in Arraignment*:

18 U.S.C. 3501(c) provides in pertinent part:

> In any criminal prosecution . . . a confession made by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law enforcement officer . . . , shall not be inadmissible solely because of delay in bringing such person before a magistrate . . . if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided*, That the time limitation in this subsection shall not apply in any case in which the delay in bringing such person before the magistrate . . . beyond such six-hour period is found

> by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate . . .
>
> (Emphasis in original).

Where delay in arraignment during which a confession is given exceeds six hours, the district court retains discretion to exclude the statements as involuntary. *U.S. v. Halbert*, 436 F.2d 1226 (9th Cir. 1970); *U.S. v. Wilson*, 838 F.2d 1081 (9th Cir. 1988).

It is well established, however, that delay is only one factor to be considered, in light of all the surrounding circumstances, in determining the voluntariness of a confession. *U.S. v. Edwards*, 539 F.2d 689, 691 (9th Cir. 1976), *cert. denied*, 729 U.S. 984; and that lapse of time between arrest and arraignment, standing alone, does not require the exclusion of a statement made during that period. *U.S. v. Beltran*, 761 F.2d 1 (1st Cir. 1985).

The court in *U.S. v. Halbert*, *supra*, performed an exhaustive analysis of 18 U.S.C. 3501 and held that it did not preclude the introduction of a confession given to a federal officer by a defendant while in state custody during a delay in arraignment in excess of six hours of the defendant's arrest. In *Halbert*, the confession which the court held to be admissible was given two days after the arrest and four days prior to the filing of federal charges.

Addressing whether an exclusionary provision should be implied under section 3501, the court stated that ". . . on its face subsection 3501(c) provides only that *some confessions shall be admitted. It does not explicitly provide that all other confessions shall not be admissible.*" (emphasis in original).

Looking to the legislative history behind the section, the court provided that such exclusion of confessions should not be implied because the intent behind the statute was to remove delay alone as a cause for rejection of a suppression while making the voluntary character of the confession the real test of admissibility, and that the provision was not intended to make the law more restrictive. *Id.* at 1232.

The *Halbert* court quotes the Senate Judiciary Committee Report on the enactment of subsection 3501(c), which states

> The section also assures that confessions made while the suspect is under arrest shall not be inadmissible solely because of delay in bringing the defendant before a magistrate . . ."

Halbert, 436 F.2d at 1236 (quoting Senate Report No. 1097, U.S. Code Cong and Adm. News).

The court in *Halbert* thus held that while the statute does not imply exclusion of a voluntary confession given more than six hours after arrest, the judge may consider delay in its determination of voluntariness, and that the determining factor in whether a confession is admissible is not the period of custody or the amount of time elapsing between arrest and confession but, rather, the nature of the police activities during this period. *Halbert*, 436 U.S. at 1230 (quoting *Smith v. U.S.*, 309 F.2d 401 (9th Cir. 1968)). (*See, also, Cote v. U.S.*, 357 F.2d 789 (9th Cir. 1966), *cert. denied*, 385 U.S. 883 (1967)).

The defendant relies upon *Wilson*, *supra*, to support his claim that the statements should be sup-

pressed under section 3501(c). In *Wilson*, however, the delay in arraignment was found to be deliberate, and for the sole purpose of obtaining a confession, a finding based on testimony that although he knew the defendant was to be arraigned, the police officer intentionally delayed the arraignment until the interrogation was completed and the confession obtained. *Wilson*, 838 F.2d at 1085.

Using the standard set forth in *Halbert*, the determination of whether the delay in the instant case is probative of the involuntariness of the defendant's confession depends upon the nature of the police activities during the delays, as well as the reason for the delay.

Where, as in the instant case, statements are made during interviews of persons in state custody by federal officers, these statements have been deemed admissible even if exceeding the time limitation under section 3501(c), provided that there is no collusive working arrangement between state and federal officers to circumvent the federal rule requiring arraignment without unnecessary delay, *U.S. v. Chadwick*, 415 F.2d 167 (10th Cir. 1969), or no evidence that the state custody was the result of an improper arrangement with federal agents. *U.S. v. Greer*, 566 F.2d 472 (5th Cir. 1978).

The Ninth Circuit has held that the period of state custody can be considered in determining whether the confession or admission was voluntary. *Smith v. U.S.*, 390 F.2d 401 (9th Cir. 1968). However, as stated in *Smith*, "The determining factor is not the amount of time elapsed between arrest and arraignment but, rather, the nature of police activity during the period." Where the confessing defendant has been

arrested by state officers and subsequently interrogated and detained by federal officers, the relevant delay in arraignment for purposes of section 3501(c) has been measured, by at least one circuit, from the commencement of federal detention where there is no proof of a working arrangement between the state and federal agencies. *U.S. v. Davis*, 459 F.2d 167 (6th Cir. 1972).

In contrast to the situation presented in *Wilson*, *supra*, there is no evidence in the instant case that the delay in arraignment was for the sole purpose of obtaining a confession or was the result of oppressive police practices prior to obtaining the confession, or that the delay otherwise caused the confession.

Evidence in the form of the agents' testimony and affidavits establishes that the defendant was taken into federal custody, transported, processed, fingerprinted and photographed immediately upon interrogation, and that arraignment was delayed until the next morning only because, due to the lateness of the day, the magistrate's calendar was full once booking was completed.

Delay in arraignment after confession due to preparation of the complaint and warrant does not render the confession involuntary under 18 U.S.C. 3501. *U.S. v. Davis*, 532 F.2d 22 (7th Cir. 1976); *U.S. v. Beltran, supra.*

Likewise, time spent in routine processing cannot be considered unnecessary or unreasonable for purposes of a delay in arraignment. *U.S. v. Johnson*, 467 F.2d 630 (2nd Cir. 1972), *cert. denied*, 410 U.S. 932 (1973). The Court will also consider whether a weekend day is involved in the delay in determining its reasonableness. *U.S. v. Shoemaker*, 542 F.2d 561

(10th Cir. 1976), *cert. denied*, 429 U.S. 1004 (1977). Two of the days between arrest and arraignment in this case were weekend days.

Although the federal agents, undoubtedly familiar with administrative and arraignment proceedings, could probably have expedited defendant's arraignment (perhaps by at least checking with the magistrate's clerk prior to the time, rather than after, the defendant was processed), arraignment could not, as defendant has argued, have taken place immediately upon interrogation because no federal charges had yet been filed, and the defendant had not yet been booked.

The delay *after* the confession and before the defendant's federal arraignment obviously has no effect on the prior confession and would not render it inadmissible. *Halbert* at 1237.

The delay in arraignment thus did not affect the voluntariness of the defendant's confession; therefore, suppression is not warranted.

The defendant offered no evidence that a collusive arrangement between state and federal agents for purposes of obtaining the confession, or that the delay or any oppressive tactics therein, caused the confession to be made.

Defendant's motion for a *Jackson v. Denno* hearing is GRANTED. Defendant's motion to suppress is DENIED.

IT IS SO ORDERED.

DATED: Dec. 2, 1988

/s/ Consuelo B. Marshall
CONSUELO B. MARSHALL, JUDGE
United States District Court

APPENDIX C

DECLARATION OF S.A. PAUL J. LIPSCOMB

1. I am a Special Agent (SA) of the United States Secret Service (USSS). I have been a Special Agent for eight and one half years. I am currently assigned to the Los Angeles Field Office, Counterfeit Squad.

2. On August 8, 1988, the Secret Service was advised by telephone that the Los Angeles County Sheriff's Department had arrested Pedro Sanchez Alverez subsequent to a search warrant being executed on his residence for narcotics. The search and arrest had occurred on August 5, 1988. We were also informed that the search had revealed one hundred and thirteen (113) counterfeit $20 Federal Reserve Notes in a jacket belonging to Alvarez.

3. Special Agent Bozzuto and I drove to the City of Industry sheriff's station, where we arrived between eleven and eleven thirty in the morning. We were met by Los Angeles Sheriff's Deputy Hernandez and Detective John McCann.

4. We went to an interview room, where defendant Pedro Sanchez Alvarez was brought and introduced to us by Deputy Hernandez. Deputy Hernandez spoke to Mr. Alvarez in Spanish, and translated our statements to Alvarez and his to us.

5. I first asked Deputy Hernandez to advise defendant of his constitutional rights under *Miranda*. Deputy Hernandez read to defendant the advise of rights in Spanish, then gave defendant the card containing the written statement of rights. Defendant said he was willing to talk to us, and marked the

card to indicate that he understood his rights and was waiving them. He then signed the card.

6. Defendant Alvarez stated that he was willing to discuss the facts of the case with us, and that he knew what this was all about, since he was at one time a police officer in Mexico.

7. The conversation between defendant and Deputy Hernandez appeared to be very free, and defendant was not at all hesitant in his responses. He did not appear to have any problem understanding Deputy Hernandez.

8. When Deputy Hernandez asked defendant if he knew the currency was counterfeit, defendant said "si," nodding his head up and down, and then said "yes" in English.

9. When he began to question defendant about his source of the counterfeit, or his knowledge of the source, he asserted his rights and said he didn't want to talk anymore. He said he was willing to discuss the facts of his personal involvement as much as we wanted, but would not involve anyone else, or say where he got it.

10. Upon defendant's assertion of his right to be silent, the interview was terminated. Special Agent Bozzuto and I took the defendant into custody and transported him to the Los Angeles field office of the United States Secret Service. He was then processed by the taking of a brief personal history, fingerprinted, and photographed.

11. Because it was then almost four in the afternoon, it was too late to get on the magistrate's calendar for that day. We therefore transported defendant to Parker Center where he was housed for the night. The next morning we picked him up, took

him to the Los Angeles field office en route to the marshal's lockup, then to the magistrate's courtroom for morning calendar. The matter was delayed until the afternoon calendar to allow pre-trial services the opportunity to verify some of the information received during interview of the defendant.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

PAUL J. LIPSCOMB

APPENDIX D

DECLARATION OF DEPUTY ABRAHAM HERNANDEZ

1. I am a deputy sheriff with the Los Angeles Sheriff's Department. I have been so employed for the last thirteen years.

2. I am a native Spanish speaker, and fluent in both Spanish and English, and receive additional compensation from the Los Angeles Sheriff's Department for my bi-lingual skills.

3. On August 5, 1988, I participated in the search of 3025 Frazier Avenue, Apartment D, in the city of Baldwin Park, pursuant to a search warrant obtained earlier that day by Detective John McCann. A copy of the search warrant and affidavit is attached hereto as exhibit 1.

4. During the search, we located one hundred thirteen (113) counterfeit $20 Federal Reserve Notes in a sleeveless vest jacket, which was found in a closet. Also found were two rent receipts for the address, made out to Pedro Alvarez.

5. Pedro Alvarez was arrested in connection with the narcotics which were located in the apartment. On August 8, 1988 we were informed that prosecution would be declined by the District Attorney.

6. On August 8, 1988, the Secret Service was informed of the discovery of the counterfeit currency.

7. On August 8, 1988, sometime before noon, Secret Service Agents Paul Lipscomb and John Bozutto came to the City of Industry Sheriff's office. Theye were shown the seized currency and took possession of it.

8. Pedro Alvarez was brought to an interview room, and I introduced him to Special Agents Lipscomb and Bozutto. Detective McCann was also present.

9. Special Agent Lipscomb asked me to advise Alvarez of his constitutional rights under Miranda. Alvarez told me that he did not read Spanish, so I read the card to him. I asked him if he had any questions at all regarding his rights, and he said no. I then asked if he wanted an attorney, and he said no. I asked if he was willing to talk, and he said, "Si, como no," or "Yes, why not?" I placed the card before him, and he indicated on the card that he understood his rights and wanted to waive them. He then signed the card.

10. Alvarez said that he was willing to discuss the facts of the case, and that he knew what this was all about, since he had been a police officer, a state police officer, and a government police officer in Mexico.

11. The conversation between myself and Alvarez seemed very easy and comfortable, and he was not at all hesitant in his responses. He did not appear to have any problem understanding me, and I did not have any problem understanding him.

12. When I asked Alvarez if he knew the currency was counterfeit, he said "si," nodding his head up and down, and then said "yes" in English.

13. When I began to question Alvarez about his source of the counterfeit, or his knowledge of the source, he asserted his rights and said he didn't want to talk anymore. He said he was willing to discuss the facts of his personal involvement as much as we wanted, but would not involve anyone else, or say where he got it.

14. Upon Alvarez' assertion of his rights, the interview was terminated. Special Agents Lipscomb and Bozutto took him into custody and left the station.

I declare under penalty of perjury that the foregoing is true and correct to best of my knowledge.

ABRAHAM J. HERNANDEZ

APPENDIX E

DECLARATION OF DETECTIVE JOHN McCANN

1. I am a detective with the Los Angeles Sheriff's Department. I have been with the Sheriff's Department for 23 years. I am the officer in charge of the investigation of Pedro Sanchez Alvarez.

2. On August 5, 1988, I obtained a search warrant for the residence located at 3025 Frazier Avenue, Apartment D, in the city of Baldwin Park. A copy of the search warrant and supporting affidavit are attached hereto as Exhibit 1.

3. The search warrant was executed on August 5, 1988. The suspect Sanchez was standing outside the door of the residence as we approached. He was detained, and taken into the residence while the search was conducted.

4. During the search, we located one hundred thirteen (113) counterfeit $20 Federal Reserve Notes in a sleeveless vest jacket, which was found in a closet. Also found were two rent receipts for the address, made out to Pedro Alvarez.

5. Pedro Alvarez was arrested at approximately 3:30 p.m. in connection with the narcotics which were located in the apartment. He was booked at approximately 5:40 p.m. Pursuant to state law, I had until Tuesday morning to present the case to the state prosecutor for a decision, and for him to be arragined on the state charges.

6. It is department policy that the Secret Service be informed in any case where counterfeit money is found. Therefore, on August 8, 1988, I telephoned the Secret Service to informed them of the discovery of the counterfeit currency.

7. Secret Service Special Agents Paul Lipscomb and John Bozutto came to the City of Industry Sheriff's office. I showed them the seized currency, and they took possession of it. Pedro Sanchez was brought to an interview room, where Deputy Hernandez, who speaks fluent Spanish, introduced him to Agents Lipscomb and Bozutto.

8. Special Agent Lipscomb asked Deputy Hernandez to advise Alvarez of his constitutional rights. Deputy Hernandez read to defendant the advisement of rights in Spanish, then gave defendant the card containing the written statement of rights. Defendant said he was willing to talk to us, and marked the card to indicate that he understood his rights and was willing to waive them. He then signed the card.

9. Sanchez said that he was willing to discuss the facts of the case, and that he knew what this was all about, since he had been a police officer in Mexico.

10. The conversation between Sanchez and Deputy Hernandez appeared to be very relaxed, and defendant was not at all hesitant in his responses. He did not appear to have any problem understanding Deputy Hernandez.

11. When Deputy Hernandez asked Sanchez if he knew the currency was counterfeit, Sanchez said "si," nodding his head up and down, and then he said "yes" in English.

12. When Sanchez was questioned for details about his source of the counterfeit currency, he said he didn't want to say anything more. He said he was willing to discuss the facts of his personal involvement, but would not involve anyone else, or say where he got the currency.

13. The interview was then terminated. Special Agents Lipscomb and Buzutto took Sanchez into custody and left.

14. This case was never presented to the District Attorney for a prosecutorial decision. Had the Secret Service decided not to presecute [*sic*] this defendant federally, I would have presented both the narcotics and counterfeit violations to the District Attorney.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

JOHN MCCANN

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 89-50060
D.C. No. CR-88-0671-CBM

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

PEDRO ALVAREZ-SANCHEZ, DEFENDANT-APPELLANT

[Filed: Jan. 22, 1993]

ORDER

Before: D.W. NELSON and REINHARDT, Circuit and PRICE*, Senior District Judge

Judges D.W. Nelson and Reinhardt voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Price recommended granting the petition for rehearing and accepting the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed.R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* The Honorable Edward Dean Price, Senior District Judge for the Eastern District of California, sitting by designation.

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No. 92-1812

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

PEDRO ALVAREZ-SANCHEZ, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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35 pp

QUESTIONS PRESENTED

1. WHETHER 18 U.S.C. § 3501(c) GIVES A LOWER COURT DISCRETION TO SUPPRESS A CONFESSION WHEN THE CONFESSION WAS GIVEN AFTER MORE THAN SIX HOURS OF DELAY IN ARRAIGNMENT AND THE DELAY WAS NOT REASONABLE.

2. WHETHER SUPPRESSION BASED ON DELAY IN ARRAIGNMENT OF MORE THAN SIX HOURS IS PERMISSIBLE UNDER 18 U.S.C. § 3501(c) WHEN THE DELAY IN ARRAIGNMENT TAKES PLACE WHILE THE DEFENDANT IS BEING HELD IN STATE CUSTODY.

3. WHETHER SUPPRESSION OF A CONFESSION IS INDEPENDENTLY MANDATED BY THE FOURTH AMENDMENT WHERE THE CONFESSION IS GIVEN AFTER MORE THAN 48 HOURS OF DELAY IN THE JUDICIAL DETERMINATION OF PROBABLE CAUSE REQUIRED BY THE FOURTH AMENDMENT AND THERE IS NO SHOWING THAT THE DELAY IN EXCESS OF 48 HOURS WAS REASONABLE.

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No. 92-1812

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

PEDRO ALVAREZ-SANCHEZ, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Defendant-respondent PEDRO ALVAREZ-SANCHEZ hereby submits his brief in opposition to the Government's Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

I.

STATEMENT OF THE CASE

The Petition for Writ of Certiorari is largely accurate in its description of the circumstances surrounding Mr. ALVAREZ' arrest and detention. It should also be noted, however, that the state authorities' notification of the

Secret Service about the discovery of the counterfeit money was pursuant to a "department policy". See Govt. Pet., App. E, at 57a. Further, the Los Angeles Sheriff's Department detective who was apparently in charge of the investigation was holding Mr. ALVAREZ in part because he was considering state charges against Mr. ALVAREZ involving the counterfeit currency; specifically, he stated that, "[h]ad the Secret Service decided not to presecute [sic] [Mr. ALVAREZ] federally, I would have presented both the narcotics and counterfeit violations to the District Attorney." Govt. Pet., App. E, at 59a. Mr. ALVAREZ was thus not being held by the state authorities solely on narcotics charges but was being held in part based on the counterfeit currency.

The record also reflects that no steps were taken to prepare for arraignment of Mr. ALVAREZ in federal court until after the interrogation by Secret Service Agent Lipscomb. See 10/31/88 Tr., at 8-9, 14-16. While the record does not reflect how long the interview took, it does suggest that the interview took some period of time. See Govt. Pet., App. C, at 51a-53a, App. D, at 54a-56a. Even prior to the interrogation, moreover, the officers knew (1) 113 counterfeit bills had been found in a jacket in Mr. ALVAREZ' home; (2) Mr. ALVAREZ had told the officers who arrested him that the clothing in the closet where the jacket was found belonged to him; and (3) rent receipts with Mr. ALVAREZ' name on them had been found in the apartment. See 10/31/88 Tr., at 21.

The Court of Appeals in reversing did conclude that the state custody must be taken into consideration (see Govt. Pet., App. A, at 20a-21a & n.8) and did discuss the different approaches taken by other Courts of Appeals in considering the circumstances under which a confession must be suppressed pursuant to 18 U.S.C. § 3501 when it is made more than six hours after arrest (see Govt. Pet., App. A, at 10a-15a). In recognizing that several circuits have held that confessions may be suppressed only if they are shown to be involuntary, however, the Court of Appeals noted that the test which these courts have applied is not a standard voluntariness test but what the court described as an "expanded voluntariness" test. Govt. Pet., App. A, at 11a. The court noted that the courts using this test do not focus on "voluntariness" in the ordinary sense but go on to consider in addition the reasons for delay. See Govt. Pet., App. A, at 11a. The court suggested that this was not in reality a different approach but more "a tautologic sleight-of-hand that hides the true basis for the suppression decision." Govt. Pet., App. A, at 12a.

II.

SUMMARY OF ARGUMENT

The petition should be denied. The Court of Appeals correctly concluded that 18 U.S.C. § 3501(c) gives a lower court discretion to suppress a confession when it is given after an unreasonable delay in arraignment of more than six

hours. This is the only conclusion which can be drawn from the legislative history, and any contrary construction would make Section 3501(c) superfluous. Further, there is not a real division of opinion among the Courts of Appeals as the Government claims. Finally, there was a finding of involuntariness in the present case in any event.

With respect to the question of whether state custody must "always" be taken into consideration in applying Section 3501(c), the present case does not clearly present a factual situation where there was no "working arrangement" between state and federal authorities and so does not clearly present the issue the government seeks to have reviewed. In any event, the Court of Appeals correctly concluded that state custody should be taken into consideration -- both the plain language of the statute and policy considerations suggest such a rule.

Regardless of how this Court might resolve the issues regarding interpretation and application of 18 U.S.C. § 3501(c), moreover, suppression of Mr. ALVAREZ' confession was independently mandated under the Fourth Amendment. The confession was given after unreasonable delay in the judicial determination of probable cause required by the Fourth Amendment, a requirement which was recognized by this Court in Gerstein v. Pugh, 420 U.S. 103 (1975) and County of Riverside v. McLaughlin, 111 S. Ct. 1661 (1991).

III.

ARGUMENT

A. REVIEW IS NOT WARRANTED BY THE COURT OF APPEALS' RULING THAT 18 U.S.C. § 3501(c) GIVES A LOWER COURT DISCRETION TO SUPPRESS A CONFESSION WHEN THE CONFESSION WAS GIVEN AFTER AN UNREASONABLE DELAY IN ARRAIGNMENT OF MORE THAN SIX HOURS.

Initially, the Government misstates the issue when it uses the word "must" in its description of the question presented. See Govt. Pet., at i. The Court of Appeals expressly declined to decide whether an unreasonable delay of more than six hours in arraignment requires suppression under 18 U.S.C. § 3501(c). See Govt. Pet., App. A, at 19a ("[w]e need not resolve the matter . . . for we conclude that the confession before us must be excluded under either approach").

1. Review Is Not Warranted Because The Court Of Appeals' Legal Analysis Was Correct, And The Division Of Opinion Among The Courts Of Appeals Is More Apparent Than Real.

The Court of Appeals was correct in its conclusion that Section 3501(c) gives a court discretion to suppress a confession based solely on delay in arraignment and independent of the actual voluntariness of the confession. While Section 3501(a) does provide generally that "a confession . . . shall be admissible in evidence if it is

voluntarily given," it does not state that such a confession must be admitted regardless of other circumstances.

To construe Section 3501(a) in this manner would make Section 3501(c) superfluous, moreover. As noted by both the Government and the Court of Appeals, Section 3501(c) provides that a confession "shall not be inadmissible solely because of delay . . . if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention." (Emphasis added.) If voluntariness mandates admission, there would be no need for this provision. Further, the negative pregnant clearly suggested by Section 3501(c) is that a confession may be excluded "solely because of delay" if not given within six hours of arrest or other detention.

The only conclusion left is that Section 3501(c) was intended to provide a qualification as to when confessions would be admitted, i.e., that a confession is admissible if it is voluntarily given, but does not need to be admitted by the trial court if it was given more than six hours following arrest or other detention. This is precisely the rule recognized by the Court of Appeals, and it is a more flexible version of the former McNabb-Mallory rule, which provided for mandatory suppression. See Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943).

The legislative history supports the Court of Appeals' interpretation, moreover. The initial version of the bill of which Section 3501 was a part was reported by the Senate Judiciary Committee without Section 3501(c) included. The Senate report which accompanied the bill as reported evidenced a clear intent to flatly and completely repudiate both the McNabb-Mallory rule and the advisement of rights rule established in Miranda v. Arizona, 384 U.S. 436 (1966). See generally S. Rep. No. 1097, 90th Cong., 2d Sess. 38-51 (1968), reprinted in 1968 U.S. Code & Ad. News 2112, 2124-38. At this point in the process, therefore, it seemed clear that the McNabb-Mallory rule was intended to be eliminated in its entirety.

The bill as reported was not agreeable to all, however. A minority report attached to the committee report noted that the title of the bill which contained Section 3501 "was retained in the bill by the narrowest possible margin in the committee -- an evenly divided vote of the full committee." See id. at 147 (Minority Views of Messrs. Tydings, et. al.), reprinted in 1968 U.S. Code Cong. & Ad. News at 2209. The minority "strongly opposed the committee action" and "urge[d] our colleagues in the Senate to delete Title II from the bill when it is offered on the floor of the Senate." Id.

The version of Section 3501 which was reported to the floor of the Senate and completely repudiated the McNabb-Mallory rule was thus highly controversial. An amendment

adding Section 3501(c) was therefore offered by Senator Scott on the floor of the Senate, in all likelihood to assure that the controversy did not derail the entire bill. See 114 Cong. Rec. 14,184-86 (1968).

Both Senator Scott and Senator McClellan, the floor manager of the bill, recognized that the addition of Section 3501(c) would place additional limits on the admissibility of confessions. Senator Scott stated: "My amendment provides that the period during which confessions may be received or interrogations may continue, which may or may not result in a confession, shall in no case exceed 6 hours." Id. at 14,184. Senator McClellan stated: "I do not want an unreasonable time, but I do want an opportunity for the law enforcement officers to perform their duty." Id. at 14,185. Thus, both Senator Scott and Senator McClellan recognized that Section 3501 as amended placed limits not only on the confessions which could be admitted but also on the time during which interrogation could continue.[1]

[1] Indeed, the way in which Senator Scott and Senator McClellan described the amendment suggests that suppression of confessions obtained after the period of delay should be mandatory. Senator McClellan referred to the time during which law enforcement officers would have "an opportunity" to interrogate a defendant, thereby suggesting there would not even be an "opportunity" later. Senator Scott referred to "the period during which confessions may be received or interrogations may continue", not simply a more exacting standard of admissibility for later confessions. Section 3501(c) does have to be reconciled with Section 3501(a), however, and, in any event, the Court of Appeals here did not reach the question of whether suppression under Section 3501(c) is mandatory.

The Government in its petition ignores this subsequent legislative history. It quotes commentary solely from the Senate Report which was written prior to the amendment which added Section 3501(c). See Govt. Pet., at 14 n. 3. It is the legislative commentary after Section 3501(c) was added to the bill which this Court should look to. That commentary demonstrates that Section 3501(c) was added to Section 3501 to preserve a limited and more reasonable McNabb-Mallory rule -- one which allowed a six-hour "safe harbor" period before the rule applied and one which perhaps made suppression discretionary rather than mandatory.

This is the view taken by virtually all of the Courts of Appeals which have considered the issue, moreover. While there appear on the surface to be two different lines of analysis, the differences are largely, if not entirely, semantic. As noted by the Court of Appeals in this case, several Courts of Appeals have openly recognized that Section 3501(c) gives a trial court discretion to suppress even a voluntary confession when there is a delay in arraignment exceeding six hours and that delay is not reasonable. See, e.g., United States v. Perez, 733 F.2d 1026, 1035 (2d Cir. 1984); United States v. Gaines, 555 F.2d 618, 623 (7th Cir. 1977); United States v. Robinson, 439 F.2d 553, 563-64 (D.C. Cir. 1970). See also United States v. Van Lufkins, 676 F.2d 1189, 1193 (8th Cir. 1982) (Section 3501(c) allows confession to be admitted "if certain conditions are met"; one of conditions is that "the confession must be made within six

hours after arrest or detention"). These courts of appeals thus clearly recognize that a limited McNabb-Mallory rule still exists.

Other Courts of Appeals have concededly described "voluntariness" as the only test. See, e.g., United States v. Christopher, 956 F.2d 536, 538-39 (6th Cir. 1991), cert. denied, 112 S. Ct. 2999 (1992); United States v. Bustamante-Saenz, 894 F.2d 114, 120 (5th Cir. 1990); United States v. Beltran, 761 F.2d 1, 8 (1st Cir. 1985); United States v. Mayes, 552 F.2d 729, 734 (6th Cir. 1977). Each of these courts, however, focuses not just on factors which affect the defendant's state of mind and thus the voluntariness of his or her confession but also focuses on the purpose of the delay and whether or not the officers causing the delay were at fault. See Christopher, 956 F.2d at 539 (emphasizing the delay was simply to allow arrestees to become sober before questioning); Bustamante-Saenz, 894 F.2d at 120 (noting delay not "for the purpose of interrogation or any other malevolent reason"); Beltran, 761 F.2d at 8 (finding "no purposeful postponement" and noting period of delay not used "for proscribed purposes envisioned by the Supreme Court when it created [the McNabb-Mallory rule]"); Mayes, 552 F.2d at 734 (noting district court must consider "the cause of the arraignment delay and . . . weigh this element appropriately in deciding whether the . . . statement shall be suppressed").

While using the term "voluntariness", these courts are in reality applying a balancing test similar to that applied by the other courts. As noted by the Court of Appeals in this case, there would be no need to consider the agents' purpose and fault in causing unreasonable delay if only the defendant's state of mind at the time he confessed was at issue. See Govt. Pet., App. A, at 11a-12a. The test which is being applied is in reality an "expanded voluntariness" test (Govt. Pet., App. A, at 11a) which differs only in name from the discretionary McNabb-Mallory rule applied by the other courts.

2. Review Is Not Warranted Because The Court Of Appeals Here Found The Confession To Be Involuntary In Any Event.

Even if the Court of Appeals erred in its legal analysis and was required under Section 3501(c) to look only to "voluntariness", moreover, it did so here. It specifically held "that even were we to apply all the factors set forth in § 3501(b), we would conclude that the confession should be excluded." Govt. Pet., App. A, at 23a n. 10. It went on to consider and weigh each of the factors set forth in Section 3501(b): (1) The delay; (2) the lack of representation by counsel; (3) the defendant's understanding of the nature of the charges, regarding which there was no evidence; and (4) whether the defendant had waived his Miranda rights. See id. The court then went on to consider in addition the reasonableness of the delay. See id.

Contrary to the Government's claim, the court did not apply any unusual concept of "voluntariness". Rather, by considering the five factors expressly set forth in Section 3501(b) and the reasonableness of the delay, i.e., the officers' purpose, the court applied the same "expanded voluntariness" test which is the minimal standard applied by all the other Courts of Appeals which have considered the issue. If the Government is suggesting that the reasonableness of the delay and the officers' purpose for the delay cannot be taken into consideration at all, it is arguing a position which has been rejected by every circuit.

Of course, the Court of Appeals factual analysis may be subject to dispute, as is almost any factual analysis. That is a narrow question not worthy of review by this Court with its scarce resources, however.[2]

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[2] The Court of Appeals did not improperly focus on delay after the confession, moreover, as the Government claims (see Govt. Pet., at 15-16). While the court did refer to the delay of arraignment from Monday afternoon to Tuesday morning, it was in doing so referring to a period which included the time during which the confession was obtained, for it described the delay as "specifically to provide federal officers with time to interrogate [Mr. ALVAREZ]." See Govt. Pet. App. A, at 21a. In describing the delay as being a delay from Monday afternoon to Tuesday morning, the court was simply recognizing that what appears to have been a half-hour or one-hour delay to conduct the interrogation was sufficient to prevent the arraignment from taking place anytime Monday afternoon and cause its necessary continuance to Tuesday morning. In any event, whether the lower court correctly analyzed the facts of this particular case and correctly applied this Court's decision in United States v. Mitchell, 322 U.S. 65 (1944) to these particular facts is also a fact-specific question not warranting review by this Court.

B. REVIEW IS NOT WARRANTED BY THE COURT OF APPEALS' RULING THAT DELAY IN ARRAIGNMENT SHOULD BE CONSIDERED IN APPLYING SECTION 3501(c) EVEN WHEN THE DELAY TAKES PLACE WHILE THE DEFENDANT IS IN STATE CUSTODY.

1. The Present Case Does Not Clearly Present The Issue Raised By The Government, Because The Facts Do Not Clearly Show There Was No "Working Arrangement" Between State And Federal Officials.

Even the Government concedes that a court must consider time in state custody under Section 3501(c) where there is a "working arrangement" between state and federal officials. See Anderson v. United States, 318 U.S. 350, 356 (1943). Here there may well have been a "working arrangement" of sorts, and, if so, the issue the Government seeks to have this Court address is not clearly presented.

This Court did not set forth any clear definition of "working arrangement" in Anderson. It did affirm the Court of Appeals' opinion in United States v. Coppola, 281 F.2d 340 (2d Cir. 1960), however. See Coppola v. United States, 365 U.S. 762 (1961). The test enunciated by the Court of Appeals in Coppola was a two-part test -- whether the detention of the defendant "was [(1)] at the behest of federal officers or [(2)] for the purpose of aiding any investigation they wished to conduct." Coppola, 281 F.2d at 344 (emphasis added). This is consistent with the tests apparently applied by several

other courts, moreover. See e.g., United States v. Barlow, 693 F.2d 954, 958 (6th Cir. 1982), cert. denied, 461 U.S. 945 (1983), quoting United States v. Rollerson, 491 F.2d 1209, 1212 (5th Cir. 1974) (detention "in order to allow the federal investigator to secure a confession"); United States v. Gaines, 555 F.2d 618, 624-25 (7th Cir. 1977), quoting United States v. Chadwick, 415 F.2d 167, 170 (10th Cir. 1969) (describing question as whether detention was "for the purpose of allowing federal officers to obtain a confession"). The purpose of the state officers is sufficient, moreover. See Anderson, 318 U.S. at 352 (noting that local sheriff made arrest "on his own initiative").

Here such a partial purpose is at least suggested by the record. The Los Angeles County Sheriff's Department detective who was apparently in charge of the investigation, Detective John McCann, stated in his declaration that he called the Secret Service because "[i]t is department policy that the Secret Service be informed in any case where counterfeit money is found." Govt. Pet., App. E, at 57a. Detective McCann further stated that the case was never presented to the District Attorney for a prosecutorial decision and that his decision about whether to present it was going to be dependent on whether or not the Secret Service decided to prosecute Mr. ALVAREZ. See Govt. Pet., App. E, at 59a. Detective McCann indicated he would have sought charges based on the counterfeit currency as well as narcotics, moreover. See Govt. Pet., App. E, at 59a.

This suggests that Detective McCann's purpose was at least in part to hold Mr. ALVAREZ for investigation by the Secret Service and then seek prosecution of Mr. ALVAREZ in state court depending on whether or not the Secret Service wished to prosecute him federally. This constitutes an implicit "working arrangement" which is sufficient under Anderson and its progeny to warrant consideration of state custody even if such a "working arrangement" is required under Section 3501(c).[3] Nothing in Anderson or in its logic requires that the "working arrangement" be an express arrangement in a specific case, as opposed to a broader one reflected in general policy such as Detective McCann referenced here.

Regardless of whether this constitutes a "working arrangement", it is clear that Detective McCann was holding Mr. ALVAREZ in state custody at least partially because he wanted to consider state charges based on the counterfeit currency. In essence, Detective McCann was holding Mr.

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[3] While the district court did make reference to several "working arrangement" cases and did appear to consider the question of whether or not there was a "collusive arrangement" between state and federal agents (Govt. Pet. App. B, at 50a), this cannot be viewed as a clear finding for two reasons. First, there was no reason for the district court to reach this factual issue, because the defense had argued, and the government had conceded, that under Ninth Circuit case law the state custody had to be taken into account in any event. See 10/31/88 Tr. at 26, 33. Second, the district court does not appear to have applied the proper "working arrangement" test, for it stated that there was "no evidence", not that the evidence which existed was insufficient. See Govt. Pet., App. B, at 50a. As noted above, there was at least some evidence of a "working arrangement" -- in Detective McCann's own admissions.

ALVAREZ in state custody so the state could act as a sort of "backup" prosecutor in the event the federal authorities decided not to prosecute. Where a defendant is being held in state custody for such a purpose and one of the charges being contemplated is the same as that which the federal authorities end up investigating and prosecuting, it is even more appropriate to consider both state and federal custody.

2. Even Where There Is No "Working Arrangement" Between State And Federal Authorities, State Custody Should Be Considered In Applying Section 3501(c), At Least When The Defendant Has Not Already Been Arraigned On Other Charges.

In any event, state custody should be considered in applying Section 3501(c) even when there is no "working arrangement" between state and federal authorities. This is initially suggested by the plain language of Section 3501(c). It refers to "arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency." (Emphasis added.) The reference is not limited to federal officers and can be contrasted with the reference later in the same sentence to "a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia." (Emphasis added.) The absence of any reference to law enforcement officers "empowered to arrest persons for offenses against the laws of the United States or of the District of Columbia" must be presumed to be purposeful. See, e.g., Russello v. United

States, 464 U.S. 16, 23 (1983), quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972) ("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").[4]

Policy considerations also support such a construction. As is suggested by the analysis set forth above, applying a "working arrangement" rule to the consideration of state custody will require courts to engage themselves in difficult factual inquiries in every individual case. Cf. Elkins v. United States, 364 U.S. 206, 212 (1960) (noting difficulty in ascertaining state/federal cooperation in Fourth Amendment exclusionary rule context). If a "working arrangement" requirement is recognized, lower courts in almost every case where an initial arrest is made by state authorities will have to inquire into what communication there was between state and federal authorities, what implicit cooperation there was, what policies there were that should be taken into consideration, and a multitude of other factors.

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[4] At least some comments made in the legislative history support such a construction, moreover. Senator McClellan, the floor manager of the bill stated: "I can appreciate that an officer might pick a suspect up at 12 o'clock at night, and need to check with officers in another State." 114 Cong. Rec. 14,184 (1968) (emphasis added). Senator Abbott spoke of a scenario where "in one of the outlying towns, . . . the sheriff picks up a man under the Dyer Act . . . on transporting a stolen vehicle across a State line illegally." Id. at 14,185 (emphasis added).

A rule barring consideration of state custody would also encourage federal officers to delay taking control of a defendant and leave the defendant in state hands while they investigate and/or with the hope that the time in state custody will "soften up" the defendant. This could defeat the purposes of Section 3501(c) and Federal Rule of Criminal Procedure 5(a) and render them largely ineffective in the many cases where parallel state investigation and prosecution is possible.

The countervailing policy considerations suggested by the Government do not outweigh these concerns. If state officers delay informing federal officers of a suspect's existence, applying Section 3501(c) simply means that the federal officers must arraign the defendant before interrogating him. While this may reduce the likelihood of obtaining a confession, it is offset by reducing incommunicado detention. If probable cause does not yet exist for arraignment on federal charges, then either the arrest is by definition illegal under the Fourth Amendment or there will be other state or federal charges on which the defendant can be arraigned. Nothing in the Court of Appeals' opinion suggests that Section 3501(c) applies to confessions obtained after a defendant has already been promptly arraigned on other state or federal charges. See post, at 19-20.

None of this Court's cases stand for the proposition that a "working arrangement" must be shown in order to require

consideration of state custody under either the original McNabb-Mallory rule or Section 3501(c). While this court did recognize the existence of such a "working arrangement" in Anderson, it did not hold that such a "working arrangement" is a necessary condition to application of the McNabb-Mallory rule.[5] Gallegos v. Nebraska, 342 U.S. 55 (1951) is inapposite because it involved neither an interrogation by federal officials nor the use of a confession in federal court.

Coppola v. United States, 365 U.S. 762 (1961) and United States v. Carignan, 342 U.S. 36 (1951) are distinguishable because the defendants there were in custody on other charges on which the defendants had already been arraigned and/or which were independently prosecuted. See Carignan, 342 U.S. at 39 (noting defendant was arrested "and duly committed" for other federal charge on same day he was arrested); United States v. Coppola, 281 F.2d at 342-343 (defendants arrested sometime in late morning, held for local police investigation during afternoon, and arraigned by local magistrate on state charges the next day; insufficient time to arraign defendant on afternoon of day arrested). This is a critical

[5] To the extent that Anderson does suggest such a requirement, it should be reconsidered in light of this Court's decision in Elkins v. United States, 364 U.S. 206 (1960). The government's claim that this Court has already rejected such reconsideration by its per curiam opinion in Coppola v. United States, 365 U.S. 762 (1961) is unfounded. As noted below, the defendants in Coppola were not detained for an unreasonable period of time before being promptly arraigned on the original state charges for which they had been arrested.

distinction, because the detention is legal once there is a prompt arraignment on other charges. See Carignan, 342 U.S. at 44.[6] The Court of Appeals' opinion in this case does not by its terms extend to the situation in which a defendant has already been or will timely be arraigned on other charges, and the Ninth Circuit will presumably distinguish such a situation if and when it is presented. Indeed, this is the same distinction which this Court did not need to consider in McNabb and later addressed in Carignan.

In sum, the plain language of Section 3501(c) and policy considerations support the view that all pre-arraignment custody should be considered in applying the six-hour "safe harbor" provisions, and this Court's prior decisions are consistent with such a rule. If the issue is to be considered by this Court, it should be considered in some other case -- where it is more clear that there was no "working arrangement" and where the lower court's legal analysis was erroneous.

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[6] The defendant in Coppola was concededly not arraigned within six hours; however, it appears that this was because he had not been in custody for six hours until the courts were closed for the day. As noted above, the defendants were promptly arraigned the next morning.

C. THE COURT OF APPEALS' HOLDING WILL BE SUBJECT TO AFFIRMANCE BY THIS COURT ON THE INDEPENDENT ALTERNATIVE GROUND THAT SUPPRESSION OF A CONFESSION IS MANDATED UNDER THE FOURTH AMENDMENT WHERE THE CONFESSION IS GIVEN AFTER AN UNREASONABLE DELAY IN THE JUDICIAL DETERMINATION OF PROBABLE CAUSE REQUIRED BY THE FOURTH AMENDMENT.

This Court recognized in Gerstein v. Pugh, 420 U.S. 103 (1975) that the Fourth Amendment requires a prompt judicial determination of probable cause as a prerequisite to extended pretrial detention following a warrantless arrest. See id. at 126. In County of Riverside v. McLaughlin, 111 S. Ct. 1661 (1991), this court held that a delay in the required judicial determination of probable cause which exceeded 48 hours was presumptively unreasonable. See id. at 1670. This requirement is in a sense a constitutional analogue, albeit a much looser one, to the McNabb-Mallory rule. Cf. Thomas, The Poisoned Fruit of Pretrial Detention, 61 N.Y.U.L. Rev. 413, 446 (1986) (analyzing McNabb-Mallory exclusionary rule rationale to Gerstein context).

In the present case, there had been a clear violation of this constitutional requirement by the time Secret Service Agent Lipscomb interviewed Mr. ALVAREZ. Mr. ALVAREZ had been held in custody for 2-1/2 days, and Detective McCann noted in his declaration that there was no reason for this other than a belief that the law allowed him to take his time. At the time Agent Lipscomb interviewed Mr. ALVAREZ, therefore, his

detention was unquestionably unlawful. This constitutional violation requires suppression of the evidence developed by the federal authorities regardless of whether there was a "working relationship" between state and federal authorities and regardless of whose custody Mr. ALVAREZ was in.

Initially, the exclusionary rule should apply to this type of Fourth Amendment violation just as it is to any other, regardless of whether or not there was probable cause for the arrest.[7] Thomas, supra p. 21, at 435 (1986). Ignoring the prompt judicial determination of probable cause requirement established in Gerstein and McLaughlin is functionally the same as ignoring search warrant requirements. The Fourth Amendment requires that a warrant be obtained if there is time and mandates application of the exclusionary rule if a warrant is not obtained; similarly, the Fourth Amendment requires a judicial determination of probable cause for detention once there is time and must mandate application of the exclusionary rule if such a determination is not obtained.

Further, application of the exclusionary rule in this context should not turn on whether or not there was a "working

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[7] Few courts appear to have considered this issue, perhaps because they can instead turn to court rules and/or statutes such as Rule 5(a) and 18 U.S.C. § 3501. One state court has suggested that a violation of the Gerstein requirement requires suppression, while another has held that it does not. Compare Williams v. State, 264 Ind. 664, 674-75, 348 N.E.2d 623 (1976) with People v. Lucas, 88 Ill. App. 3d 942, 948, 410 N.E.2d 1040 (1980). To commentators who have addressed the issue have suggested that the exclusionary rule should be applied. See 2 W. LaFave, Search and Seizure 425 (2d ed. 1987); Thomas, supra p. 21, at 460-61.

arrangement" between state and federal officers or whose custody the defendant was in. Such a conclusion is compelled by this Court's analysis in Elkins v. United States, 364 U.S. 206 (1960), in which the Court ruled that no cooperative relationship was required in order to suppress evidence obtained through other Fourth Amendment violations. Indeed, the history of this Court's decisions which led up to the Elkins decision are similar to the development of the law in the prompt arraignment context. This Court originally applied a "joint operation" requirement because it had held the Fourth Amendment did not apply to state officials; the Court then decided that the Fourth Amendment did apply to state officials; and this new rule that the actions of the state officials were unlawful under the Fourth Amendment meant the fruits of their actions could not be used in the federal prosecution. See Elkins, 364 U.S. at 211-13. Similarly, here, there was initially no constitutional rule recognized but only the federal supervisory and statutory rules recognized in McNabb-Mallory and Section 3501(c); the Court has since decided in Gerstein and McLaughlin that there is a constitutional requirement of a prompt judicial determination of probable cause; and, now that extended detention in state custody must be viewed as violative of the federal constitution, the exclusionary rule should be applied to evidence obtained while a defendant is in state custody just as it is to evidence obtained while the defendant is in federal custody.

Finally, suppression of evidence obtained as a result of a Fourth Amendment violation is mandatory.[8] This eliminates any need to address the question of whether Section 3501(c) is mandatory or discretionary and, if the latter, what standards govern a court's exercise of discretion.

In sum, the lengthy 2-1/2 day delay here complicates -- and likely moots -- the issues the Government raises -- by bringing the requirements of Gerstein v. Pugh and Riverside County v. McLaughlin into play. The result reached by the Court of Appeals here would have to be upheld based on the constitutional requirements recognized in those decisions, regardless of whether the Court of Appeals' application of Section 3501(c) was correct. To the extent the Government might argue that the exclusionary rule does not apply to a violation of the requirements of Gerstein and McLaughlin, moreover, this Court would have to consider the additional difficult question of whether and how an exclusionary rule should be applied in that context, and the Court would have to do this in the almost complete absence of any lower court experience in analyzing the issue. The Court should therefore deny the petition in this case and await a case which does not mix issues by involving Gerstein and McLaughlin with the Section 3501(c) issues raised by the Government.

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[8] Suppression may, of course, be inappropriate where the "attenuation", "independent source", or "inevitable discovery" exceptions to the exclusionary rule apply. See, e.g., Brown v. Illinois, 422 U.S. 590 (1974). See generally Murray v. United States, 487 U.S. 533, 536-39 (1988). None of those exceptions are even remotely applicable here, however.

IV.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

MARIA E. STRATTON
Federal Public Defender

DATED: July 7, 1993

CARLTON F. GUNN
Deputy Federal Public Defender

GUNN5/jj/wp/

No. 92-1812

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

PEDRO ALVAREZ-SANCHEZ, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

CERTIFICATE OF SERVICE

I, Carlton F. Gunn, hereby certify that on this 9th day of July, 1993, a copy of Motion for Leave to Proceed in Forma Pauperis and Respondent's Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were mailed postage prepaid,

* * *

* * *

to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, counsel for the Petitioner.

Respectfully Submitted,

DATED: July 9, 1993

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No. 92-1812

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AFFIDAVIT OF MAILING

I, CARLTON F. GUNN, a member of the Bar of this Court, hereby certify that to the best of my knowledge, the attached Petition for Writ of Certiorari was deposited in a United States Post Office mail box, with first class postage prepaid,

* * *

* * *

and properly addressed to the Clerk of the Court on July 9, 1993, within the permitted time for filing this brief.

DATED: July 9, 1993

Respectfully submitted,

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ACKNOWLEDGEMENT

State of California
County of Los Angeles
On , before me, _____
personally appeared Carlton F. Gunn.
personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

NOTARY PUBLIC

OFFICIAL SEAL
ANGELA M. SANTANA
Notary Public-California
LOS ANGELES COUNTY
My Commission Expires
April 30, 1994

No. 92-1812

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

PEDRO ALVAREZ-SANCHEZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

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1. The dispositive question in this case is whether an arrest by state officers on state-law charges qualifies as the "arrest" contemplated by 18 U.S.C. 3501(c). As demonstrated in the petition (Pet. 8-10), the context in which the term "arrest" is used requires the conclusion that the only relevant arrests are those made for violations of federal law. Respondent has failed to cast any doubt on the correctness of our statutory analysis. Indeed, respondent avoids any discussion of the language of the statute, except for a brief claim (Br. in Opp. 16-17) that the statute's reference to arrests effected by "any" law enforcement officers is broad enough to encompass state officials. That claim, however, is irrelevant to our submission. We do not contend that arrests by state officers cannot qualify under

Section 3501(c). Our contention instead is that the arrest, whether by federal or state officers, must be for a violation of federal law. Only such an arrest can sensibly be viewed as imposing upon the arresting officer the duty to "bring[ ] such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States." 18 U.S.C. 3501(c).

Respondent likewise does not seriously take issue with our submission that the rule adopted by the court of appeals—that state and federal custody must "always" be aggregated for purposes of pre-arraignment delay, Pet. App. 20a-21a n.8—is far more generous to criminal defendants than the supervisory rule this Court followed before the enactment of Section 3501, a rule that Section 3501 clearly was intended to limit. Under that supervisory rule, pre-arraignment delay caused by state officers could not be attributed to federal authorities unless the defendant demonstrated the existence of a collusive "working arrangement" for the purpose of depriving the defendant of a speedy federal arraignment. Unlike the Ninth Circuit, other courts of appeals continue to require that a defendant make at least that showing before state custody will be imputed to the federal government. See Pet. 12-13 (citing cases).

Respondent contends that this case is not an appropriate vehicle for examining the circumstances under which state and federal custody may be aggregated, because the record in this case does not clearly show the absence of a "working arrangement," and because "there may well have been a 'working arrangement' of sorts" here. See Br. in Opp. 13-16. The problem with respondent's contention is that, outside the Ninth Circuit, it is the *defendant's* burden to show "clearly" that state and federal authorities colluded and "that state custody was 'designingly utilized' to circumvent the prompt hearing requirement." *United States* v. *White,* 979 F.2d 539, 543 (7th Cir. 1992); see also

United States v. *Torres,* 663 F.2d 1019, 1024 (10th Cir. 1981) ("it was incumbent upon the appellants to show that state custody was used in order to circumvent" federal speedy arraignment requirements), cert. denied, 456 U.S. 973 (1982); *United States* v. *Rollerson,* 491 F.2d 1209, 1212 (5th Cir. 1974) (same). And that burden must be met with "facts, * * * not mere suspicion or conjecture" showing that "federal law enforcement officers induce[d] state officers to hold the defendant illegally so that they [could] secure a confession." *United States* v. *Coppola,* 281 F.2d 340, 344 (2d Cir. 1960) (*en banc*), aff'd, 365 U.S. 762 (1961); accord *United States* v. *Carter,* 910 F.2d 1524, 1528 (7th Cir. 1990), cert. denied, 111 S. Ct. 1628 (1991). Thus, far from supporting respondent's contention that this case is not a good vehicle for review, respondent's own description of the record as unclear and his attempt to substitute conjecture for fact confirm that the government would prevail in this case under the standards followed outside the Ninth Circuit.

Citing *Elkins* v. *United States,* 364 U.S. 206 (1960), respondent also contends (Br. in Opp. 17-20) that "[p]olicy considerations" support abandonment of the "working arrangement" requirement in favor of the rule adopted by the court of appeals. A contention that a new rule of law is justified by policy—despite the contrary language of the statute, the contrary decisions of this Court before the passage of the statute, and the contrary view of every other court of appeals to consider the question after passage of the statute—is hardly a reason for denying plenary review. In any event, as we explained in the petition (Pet. 12 n.1), this Court rejected the identical contention based on *Elkins* in *Coppola* v. *United States,* 365 U.S. 762 (1961) (per curiam).[1]

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[1] Respondent erroneously claims that *Coppola* does not foreclose his argument that the "working arrangement" rule should be recon-

2. Correction of the court of appeals' error on the aggregation issue will place respondent's confession within the statutory six-hour safe harbor, see 18 U.S.C. 3501(c), and will therefore obviate the need to consider the second question presented by this case. But even if the Court were to agree with the court of appeals' conclusion on the aggregation issue, certiorari would be warranted to review the court of appeals' conclusion that a confession given more than six hours after arrest may be suppressed solely to penalize the government for the delay, even when the delay identified by the court *followed* the confession.

Respondent concedes (Br. in Opp. 9-10) that the courts of appeals are divided on the course to be followed when a confession falls outside the statutory six-hour safe harbor—some courts follow the statutory mandate of 18 U.S.C. 3501(a) and exclude the confession only if it is shown to be involuntary, while others invoke supervisory

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sidered in light of *Elkins*, because *Coppola* involved a defendant who was not "detained for an unreasonable period of time before being promptly arraigned on the original state charges." Br. in Opp. 19-20 & n.5. Contrary to respondent's factual distinction, the government conceded in *Coppola* that the confessions at issue were elicited while the defendant was illegally detained "by reason of the failure of the police to arraign him with the promptness required by New York law." Brief for the United States at 44-45 n.30, *Coppola* v. *United States*, No. 153 (O.T. 1960); *id.* at 42-43, 70. The defendant in that case "was detained for 29 hours without seeing a judicial officer of any sort; and for 19 of these hours he was under the visitation of federal officers." *Coppola* v. *United States*, 365 U.S. at 764 (Douglas, J., dissenting). More importantly, the narrow factual distinctions suggested by respondent overlook the fact that the petitioner in *Coppola* argued that the Court should abandon the "working arrangement" requirement in light of its intervening decision in *Elkins*, Brief for Petitioner at 26-33, *Coppola* v. *United States*, No. 153 (O.T. 1960), and this Court expressly declined to do so. *Coppola* v. *United States*, 365 U.S. at 762 ("We find no merit in the other argument advanced by the petitioner.").

authority to suppress even voluntary confessions under the *McNabb-Mallory* line of cases. Respondent contends, however, that the differences in approach are "largely, if not entirely, semantic" because all courts "in reality" apply a "balancing test." Br. in Opp. 9, 11. That is not so. Some courts of appeals have strictly heeded the command of 18 U.S.C. 3501(a), that "[i]n any criminal prosecution * * * a confession * * * shall be admissible in evidence if it is voluntarily given." See, *e.g.*, *United States* v. *Shoemaker*, 542 F.2d 561, 563 (10th Cir.) ("Voluntariness is the sole test for admissibility of a confession"), cert. denied, 429 U.S. 1004 (1976).[2]

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[2] Respondent claims (Br. in Opp. 10-11) that courts of appeals that follow the voluntariness approach actually are engaged in "balancing," because those courts sometimes make reference to how the government used the period of delay, a factor that respondent believes is necessarily unrelated to free will. But courts that follow the voluntariness approach consider the use made of the period of delay in order to assess whether the defendant's time in custody was used "to employ the condemned psychologically coercive or third-degree practices of interrogators." *United States* v. *Beltran*, 761 F.2d 1, 8 (1st Cir. 1985) (brackets omitted); accord *United States* v. *Christopher*, 956 F.2d 536, 538-539 (6th Cir. 1991) (same), cert. denied, 112 S. Ct. 2999 (1992); *United States* v. *Bustamante-Saenz*, 894 F.2d 114, 120 (5th Cir. 1990) (delay did not result in "lengthy, hostile, or coercive interrogation"). Consideration of that factor therefore merely reflects the common-sense notion that third-degree practices are likely to elicit involuntary confessions, but that delays caused by travel, booking, or other routine processing, or even by the fact that the defendant in the particular case "refused to go before the magistrate until he had seen members of his family," *United States* v. *Shoemaker*, 542 F.2d at 563, present little danger of overwhelming the defendant's free will. That type of voluntariness analysis is far removed from the overt balancing of policy considerations against free will factors in which the court of appeals engaged in this case. See Pet. App. 23a n.10. For that reason, respondent is wrong in suggesting (Br. in Opp. 11-12) that the court of appeals' statement that respondent's confession was "involuntary" should preclude plenary review of this case.

Respondent also contends that the legislative history of Section 3501 indicates that Congress intended "to preserve a limited and more reasonable *McNabb-Mallory* rule—one which allowed a six-hour 'safe harbor' period before the rule applied and one which perhaps made suppression discretionary rather than mandatory." Br. in Opp. 9. That claim is unpersuasive. Respondent concedes (Br. in Opp. 7-8) that the bill that ultimately became Section 3501 unquestionably was intended to overrule the *McNabb-Mallory* rule when the bill emerged from the Senate Judiciary Committee. Respondent claims, however, that that clear intent was abandoned when the six-hour safe harbor period was later added as a floor amendment, a conclusion purportedly supported by two remarks made on the floor in support of the amendment. See Br. in Opp. 8. But even those two remarks merely reflect what is plain from the face of Section 3501(c)—a generalized concern that interrogations should not exceed six hours. They do not support the claim that suppression is authorized for confessions that fall outside that safe-harbor period. Those two remarks therefore cannot override Section 3501(a)'s command that all voluntary confessions "shall be admissible."

In any event, as we explained in the petition (Pet. 15-16), this Court's decision in *United States* v. *Mitchell*, 322 U.S. 65 (1944), which held that time elapsed *after* a confession may not be used to justify suppression, demonstrates that the rule adopted by the court of appeals is plainly wrong even if the broadest possible version of the *McNabb-Mallory* doctrine remains the law. Respondent's principal response (Br. in Opp. 12 n.2) is that the court of appeals' emphasis on the *post*-confession delay should be understood (contrary to what the court actually said) as having been intended to highlight the effect of the *pre*-confession delay. Apart from that unsupported assertion,

respondent can only suggest that review should be denied because the correctness of the court of appeals' decision under *Mitchell* is "a fact-specific question" unworthy of review. Br. in Opp. 12 n.2. The facts are not, however, in dispute. The court of appeals stated that suppression was warranted solely by the delay "from Monday afternoon to Tuesday morning," Pet. App. 21a, when it is undisputed that respondent confessed on Monday morning. See Pet. 8; Br. in Opp. 1. It is also clear, as the district court found, that the delay on which the court of appeals relied was caused solely by the fact that "the magistrate's calendar was full once booking was completed." Pet. App. 49a. A published decision authorizing suppression in those circumstances, in the teeth of directly contrary authority from this Court and from other circuits, see Pet. 16; see also *United States* v. *Rojas-Martinez*, 968 F.2d 415, 418 (5th Cir.), certs. denied, 113 S. Ct. 828 (1992), and 113 S. Ct. 995 (1993), warrants this Court's attention.

3. Respondent argues (Br. in Opp. 21-25) that this Court should deny plenary review because the court of appeals' decision will be subject to affirmance on the alternative ground that, by holding him in custody over the weekend, the state authorities violated the Fourth Amendment. A party may not, however, defend a judgment in his favor on an alternative ground unless that ground was "properly raised below." *Washington* v. *Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). Respondent did not argue in the district court or the court of appeals that the length of his detention violated the Fourth Amendment, or that the purported Fourth Amendment violation required suppression of his confession; he claimed only that his confession was obtained in violation of 18 U.S.C. 3501 and the Fifth Amendment.[3]

[3] Respondent's new claim is predicated on *County of Riverside* v. *McLaughlin*, 111 S. Ct. 1661 (1991), which held that the Fourth

And because the court of appeals did not decide this case on Fourth Amendment grounds, that claim would not counsel against plenary review of the rule adopted by the court of appeals.

* * * * *

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

SEPTEMBER 1993

Amendment's requirement of a "prompt" judicial determination of probable cause following a warrantless arrest, see *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), generally means that a probable cause hearing must be provided within 48 hours of arrest. *McLaughlin* recognized that the 48-hour limit is subject to exceptions in cases "of a bona fide emergency or other extraordinary circumstance." *County of Riverside* v. *McLaughlin*, 111 S. Ct. at 1670. While respondent's waiver of his Fourth Amendment claim precluded the development of a record on whether extraordinary factors of the type contemplated by *McLaughlin* were present in this case, the record does reflect—and respondent appears to concede, Br. in Opp. 21—that the state authorities relied on a California statute that excluded weekends and holidays from that 48-hour period. See Pet. App. 57a. The automatic exclusion of weekends and holidays effected by that California statute was rejected by the Court in *McLaughlin*, 111 S. Ct. at 1665, 1670, but that rejection occurred nearly three years after the state officers relied on that provision of California law in this case. This Court's decision in *Illinois* v. *Krull*, 480 U.S. 340, 349-355 (1987), therefore would preclude respondent from obtaining suppression of evidence in these circumstances even if the Fourth Amendment was in fact violated, and even if respondent had preserved that claim.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1993—342-479/86012

No. 92-1812

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES, PETITIONER

v.

PEDRO ALVAREZ-SANCHEZ, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

DENNIS LANDIN
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Counsel for Petitioner

PETITION FOR WRIT OF CERTIORARI FILED MAY 12, 1993
CERTIORARI GRANTED OCTOBER 12, 1993

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CR-88-00671-01

U.S.

v.

ALVAREZ-SANCHEZ

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
08/08/88		Defendant arrested (Dkt'd 08/16/88).
08/09/88	1	Filed magistrate complaint (JUDGE EICK) (Dkt'd 08/16/88).
		Arraignment on magistrate complaint held (DFT ARRN, STATES T/N PEDRO ALVAREZ SANCHEZ, ATTY: CAROL KLAUSCHIE APPTD/DFPD. COM TO CUST USM. CRJ ORDS 2 CALLS. CASE CONTINUED TO 8/11/88 @ 10:30 A.M. MR.) (JUDGE EICK) (Dkt'd 08/16/88).
		Defendant's first appearance (Dkt'd 08/16/88).
		Bail not allowed (JUDGE EICK) (Dkt'd 08/16/88).

DATE	NR.	PROCEEDINGS
08/09/88		Preliminary examination set for 08/23/88 @ 4:30 PM (P/I ARRN SET FOR 9/29/88 @ 8:30 A.M. MR.) (JUDGE EICK) (Dkt'd 08/16/88).
		Detention hearing set for 08/11/88 @ 10:30 AM (DETHRG. MR.) (JUDGE EICK) (Dkt'd 08/16/88).
		Order filed (FLD ORD OF TEMPORARY DETENTION. MR.) (Dkt'd 08/16/88).
		—FLD NOTC DIR DFT TO APPEAR. FLD FINANCIAL AFFID. FLD NOTC OF REQUEST FOR DETENTION. MR. (Dkt'd 08/16/88).
08/11/88		Detention hearing held (CRT SETS BAIL AT $10,000 AB 10% DEP, W/O SUR, RESP 3RD PRTY. W/PSA INT SUPV. TRVL REST CDC. RESIDE W/APPRVL OF PSA. AVOID PLACES OF EGRESS, SC) (JUDGE EICK) (Dkt'd 08/24/88).
		Order surety/cash bail set in the amount of $10,000.00 (10% DEP, W/AFFID SUR NO JUST BY RESP 3RD PRTY. LEGAL ESIB APPRVD BY PSA OR GVT. TRVL REST CDC. AVOID PLACES OF EGRESS. SC) (JUDGE EICK) (Dkt'd 08/24/88).
08/19/88	2	Filed indictment (KING) (Dkt'd 08/24/88).
		Order surety/cash bail set in the amount of $10,000.00 (10% DEP, AFFID SUR. SC) (KING) (Dkt'd 08/24/88).
	3	—FLD CR72 BY AUSA MADISON. SC (Dkt'd 08/24/88).
08/29/88	4	Arraignment held (Count 1) (DEFT ARRN, STATES T/N AS CHRGD. FG.) (MAGISTRATE TASSOPULOS) (Dkt'd 09/12/88).

DATE	NR.	PROCEEDINGS
08/29/88		Order appointing attorney KLAUSCHIE, CAROL to represent defendant (MAGISTRATE TASSOPULOS) (Dkt'd 09/12/88).
		Defendant appears with counsel (Dkt'd 09/12/88).
		Arraignment and plea continued to 09/12/88 @ 11:30 AM (Count 1) (PLEA, TRIAL SET & ALL FURTH PROC BE HLD BEFR JDGE MARSHALL. FG.) (MAGISTRATE TOSSOPULOS) (Dkt'd 09/12/88).
	5	—FLD STATE OF DEFT'S CONST RIGHTS. FG. (Dkt'd 09/12/88).
09/12/88	6	Arraignment held (Count 1) (DEFT ARRN, STATES T/N AS CHRGD, & ENT N/G PLEA TO CNT 1 OF INDICT. CRT ORD J/T ON 10/ 25/88 AT 9:00AM. STAT CONF 10/17/88 AT 1:30P.M. ALL MOTN FLD NLT 9/26/88, OPPOS TO MINS FLD NLT 10/3/88 & ANY REPLY TO OPPOS FLD NLT 10/11/88. FG.) (JUDGE MARSHALL) (Dkt'd 09/23/88).
		Defendant enters plea of not guilty (Count 1) (JUDGE MARSHALL) (Dkt'd 09/28/88).
		Trial date set for 10/25/88 @ 9:30 AM (Count 1) (STAT CONF ON 10/17/88 @ 1:30PM. ALL MOTN FLD NLT 9/26/88, OPPO NLT 10/3/88, REPLY TO OPPOS NLT 10/11/88. FG.) (JUDGE MARSHALL) (Dkt'd 09/28/88).
		Status hearing set for 10/17/88 @ 1:30 PM (JUDGE MARSHALL) (Dkt'd 09/28/88).
09/23/88	7	Motion filed (MOT#1) (FLD DEFT'S NOTC OF MOTN, MOTN TO SUPP STATE SEIZED IN VIOL OF MIRANDA. MEMO OF PTS & AUTH. EXHB. HRG DATE 10/17/88 AT 1:30PM. FG.) (Dkt'd 10/03/88).

DATE	NR.	PROCEEDINGS
09/26/88	8	Motion filed (MOT#2) (FLD DEFT'S NOTC OF MOTN, MOTN FOR JACKSON V DENNO HRG PRIOR TO TRIAL. MOTN TO SUPP EVID. MEMO OF PTS & AUTH. DECLR OF CNSL. HRG DATE 10/17/88 AT 1:30PM. FG.) (Dkt'd 10/03/88).
10/12/88	9	Filed memorandum in opposition to motion (MOT#1) (FLD GVT'S OPP TO MOTN TO SUPPRESS EVID, MEMO OF PTS AND AUTHORITIES, DECLARATION. SM) (Dkt'd 10/20/88).
10/14/88	10	—FLD RESPONSE TO MOTN FOR JACKSON DENNO HRG, MEMO OF PTS AND AUTHORITIES. SM (Dkt'd 10/20/88).
10/17/88	11	Status hearing held (MOTS CONT'D TO 10/24/88, 3PM. DEFT'S REPLY 2B FLD NLT 10/20. TR WILL BE RESET UPON RULING OF MOTS. GV CNSL TO PREP ORD EXCLUD TI. RLB) (JUDGE MARSHALL) (Dkt'd 10/28/88).
10/20/88	12	Filed reply to answer to motion. (MOT#2) (DFT'S REPLY TO GV'S OPP TO MOT FOR JACKSON —V— DENNO HRG. RLB) (Dkt'd 10/31/88).
10/24/88	17	Order filed (MIN ORD: CRT'S OWN MOT SETS STAT CONF FOR HRG ON DFTS MOTS.) (JUDGE MARSHALL) (Dkt'd 11/09/88).
10/27/88	13	—FLD SUPPLEMENTAL OPP TO DFT'S MOTN FOR JACKSON DENNO HRG, MEMO OF PTS AND AUTHORITIES, DECLARATION OF DETECTIVE JOHN MCANN AND JIMMYE WARREN. SM (Dkt'd 11/08/88).

DATE	NR.	PROCEEDINGS
10/28/88	14	Order filed (FLD FINDINGS AND ORD RE CONTD OF TRIAL EXCLUDABLE PERIOD UNDER SPEEDY TRIAL ACT OF 1974. SM) (JUDGE MARSHALL) (Dkt'd 11/08/88).
	15	Excludable delay based on finding the ends of Justice served by continuance began on 09/23/88 and ended on 10/31/88 (ENDS OF JUSTICE. SM) (JUDGE MARSHALL) (Dkt'd 11/08/88).
10/31/88	16	—FLD DECLARATION OF DETECTIVE JOHN MCANN. SM (Dkt'd 11/08/88).
	18	Motion hearing held (MOT#1) (HRG MOT TO SUPPRESS: SW WITS. MOT DFT TO S/T & FOR JACKSON V DENNO HRG ARGUED & SUBMITTED W/O FUR ORAL ARG. MI-RLB) (JUDGE MARSHALL) (Dkt'd 11/22/88).
12/02/88	19	Order filed (ORD GRANTING DFT'S MOT FOR JACKSON DENNO HRG. DFT'S MOT TO SUPPRESS IS DENIED. RLB) (JUDGE MARSHALL (Dkt'd 12/09/88).
	19	Motion granted in part: denied in part (MOT #2) (DFT'S JACKSON V DENNO HRG IS GRANTED. DFT'S MOT TO SUPPRESS IS DENIED. RLB) (JUDGE MARSHALL) (Dkt'd 12/09/88).
12/08/88	20	Defendant's requested voir dire (Dkt'd 12/19/88).
	21	Filed defendant's proposed jury instructions (Count 1) (CLEAN COPY. RLB) (Dkt'd 12/19/88).
	22	Filed defendant's proposed jury instructions (Count 1) (CITED COPY. RLB) (Dkt'd 12/19/88).

DATE	NR.	PROCEEDINGS
12/08/88	23	—DFT'S EX PARTE APP FOR ORD PERM DFT TO WEAR CIVILIAN CLOTHES AT TR. RLB (Dkt'd 12/19/88).
	24	Order filed (ORD PROVIDING CIVILIAN CLOTHES. RLB) (JUDGE MARSHALL) (Dkt'd 12/19/88).
	25	Status hearing held (STAT CONF: SET FOR TR 12/13 9:30AM. GV CNSL TO SUB PROP ORD EXCLUD TI. SE—RLB) (JUDGE MARSHALL) (Dkt'd 12/20/88).
	25	Trial date continued to 12/13/88 @ 9:30 AM (Count 1) (JUDGE MARSHALL) (Dkt'd 12/20/88).
12/13/88	26	Filed government's proposed jury instructions (Count 1) (Dkt'd 12/20/88).
	27	Filed trial memorandum (Count 1) (GV'S TRIAL MEMO) (Dkt'd 12/20/88).
	28	Motion in limine filed (MOT#3) (Count 1) GV'S MOT IN LIMINE TO ADMIT EVID OF OTHER CRIMES. RLB) (Dkt'd 12/20/88).
	29	Filed transcript of proceedings for 10/31/88 (Dkt'd 12/21/88).
	30	—RECPT FOR RPTR'S TRANSC OF 10/31/88. RLB (Dkt'd 12/21/88).
	31	Filed government's proposed jury instructions (Count 1) (Dkt'd 12/21/88).
	36	Voir dire begins-jury (Count 1) (Dkt'd 02/04/89).
	36	Trial begins-jury (Count 1) (Dkt'd 02/04/89).

DATE	NR.	PROCEEDINGS
12/13/88	36	Trial held-jury (Count 1) (J/T 1ST DY: J SWN & IMP. J/T CONT'D. DS-RLB) (JUDGE MARSHALL) (Dkt'd 02/04/89).
	36	Jury trial continued to 12/13/88 (Dkt'd 02/04/89).
12/14/88	37	Trial held-jury (Count 1) (J/T 2ND DY: CNSL MK OPNG STMT. PRTYS REST. REBUTTAL BY GV. PRTYS REST. DFT MOT FOR JQ DEN. J/T CONT'D. DS—RLB) (JUDGE MARSHALL) (Dkt'd 02/04/89).
	37	Jury trial continued to 12/15/88 @ 8:00 AM (3RD DY) (JUDGE MARSHALL) (Dkt'd 02/04/89).
	32	Filed defendant's proposed jury instructions (Count 1) (MARKED SET, SUPPL. RLB) (Dkt'd 12/21/88).
	33	Filed defendant's proposed jury instructions (Count 1) (CLEAN SET, SUPPL. RLB) (Dkt'd 12/21/88).
12/15/88	38	Trial held-jury (Count 1) (J/T 3RD DY: CT INST JY. MATRN SWN. J/RETIRES TO DELIB, 9AM. CNSL STIP & CRT ORDS EXHBTS 2 & 6 MAY BE RELEASED TO CASE AGENT LIPSCOMB. 12:25PM J/TRND W/VERDICT OF GUILTY. J/POLLED. BR-RLB) (JUDGE MARSHALL) (Dkt'd 02/06/89).
	38	Trial ends-jury (Count 1) (Dkt'd 02/06/89).
	38	Jury verdict of guilty (Count 1) (JUDGE MARSHALL) (Dkt'd 02/06/89).
	38	Order cause referred to the probation department for a pre-sentence investigation (Count 1) (JUDGE MARSHALL) (Dkt'd 02/06/89).

DATE	NR.	PROCEEDINGS
12/15/88	38	Sentencing set for 01/23/89 @ 1:30 PM (Count 1) (JUDGE MARSHALL) (Dkt'd 02/06/89).
	39	—FLD JURY VERDICT. RLB (Dkt'd 02/06/89).
	40	Jury notes filed (NOTE #1. RLB) (Dkt'd 02/06/89).
	41	Jury notes filed (NOTE #2. RLP) (Dkt'd 02/06/89).
	42	Exhibit list filed (Count 1) (Dkt'd 02/06/89).
12/28/88	35	—COURTS INSTRUCTIONS, RLB (Dkt'd 01/03/89).
01/18/89	43	Order filed (MIN ORD: SENT CONT'D TO TO 2/6/89 AT 2:00PM. RLB) (JUDGE MARSHALL) (Dfft'd 02/06/89).
	43	Sentencing continued to 02/06/89 @ 2:00 PM (Count 1) (JUDGE MARSHALL) (Dkt'd 02/06/89).
02/06/89	44	—FLD LETTR RE:SENT LETTER: KKG (Dkt'd 02/10/89).
	45	Sentencing continued to 02/08/89 @ 1:30 PM (Count 1) (JUDGE MARSHALL) (Dkt'd 02/15/89).
02/09/89	46	Sentencing of defendant (Count 1) (SENT A/G 12 MOS, 3 YRS SURV REL, UPON CONDS: NOT COMMIT ANY FUR LAW VIOL, COMPLY W/R&R OF P/D &80225, COMPLY W/RULES OF INS, NOT RE-ENTER USA W/O, PERMISSION OF INS, IF REENTERS USA MUST RPT TO PO W/IN 48 HRS, PAY $50.00 PEN ASSESSMENT. PAYMENT OF PEN ASSESSMENT STAYED. DFT TO REC CREDIT FOR TI SERVED. DFT INFORMED OF RIGHT TO APPEAL. KKG) (JUDGE MARSHALL) (Dkt'd 02/15/89).

DATE	NR.	PROCEEDINGS
02/10/88	47	Filed notice of appeal (Count 1) (APPL#1) (FLD DFT NOTC OF APPEAL FRM J/M ENT 2-8-89. KKG) (JUDGE MARSHALL) (Dkt'd

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 89-50060

U.S.

v.

ALVAREZ-SANCHEZ

DOCKET ENTRIES

DATE	PROCEEDINGS
2/22/89	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Filed in D.C. on 2/17/89; (RT required: y) (Sentence imp 12 months) [89-50060] transcript shall be ordered by 3/8/89; transcript shall be filed by 4/7/89; appellants' briefs, excerpts due by 5/17/89; appellee's brief due 6/16/89 for USA; appellants' reply brief due 6/30/89. (kn)
8/11/89	Filed Appellant Pedro Alvarez-Sanchez's motion to extend time to file appellant's opening brief until 9/15/89 [89-50060] served on 8/9/89 [1645854] [89-50060] (ec)
8/15/89	Filed order (Deputy Clerk: mlm) Aplt informs this court that the transcripts were recvd May 17, 1989. DC is requested to issue COR promptly or inform this court of any barrier to its issuance . . . Aplt's motion to extend time to file appellant's opening brief is granted. The opening brief and excerpts are due Sept. 15, 1989. Absent truly ex-

DATE	PROCEEDINGS
8/15/89	traordinary circumstances, no further ext of time to file this brief will be granted . . . Aple's brief due Oct 16, 1989. Optional reply brief due Oct 30, 1989. Aplt is informed that this court employs fixed due dates for briefing schedules, and that failure of the timely completion of a previous step does not automatically vacate subsequent deadlines. This order is subj to reconsideration. . . . [89-50060] (ec)
9/6/89	Filed CRIMAT certificate of record on appeal RT filed in DC: 12/13/88. [89-50060] (jhc)
9/15/89	Filed original and 15 copies Appellant Pedro Alvares Sanchez opening brief 30 pages, and five excerpts of record in 1 volume; served on 9/13/89 [89-50060] (ec)
10/13/89	10 day oral extension by phone of time to file USA's brief. [89-50060] appellees' brief due 10/26/89; appellants' reply brief due 11/9/89; (pq)
11/28/89	Filed aple's brief (10 pgs) original + 15 copies (11/20) [89-50060] (dmd)
2/26/90	Calendar check performed [89-50060] (th)
3/1/90	Screening letter sent. [89-50060] (th)
7/5/90	FILED, AS OF 9/6/89, CERTIFIED RECORD IN APPEAL IN 3 VOLS. (TOTAL): 2 CLERKS REC 1 RTS (ORIG) [89-50060] [89-50060] (jw)
8/20/90	SUBMITTED TO SCREENING PANEL 126. [89-50060] [89-50060] (th)
8/20/90	Removed from screening calendar. Parties notified. [89-50060] [89-50060] (th)
8/24/90	Calendar check performed [89-50060] (aw)
8/26/90	Calendar materials being prepared. [89-50060] [89-50060] (aw)

DATE	PROCEEDINGS
8/27/90	Received Appellee USA letter dated Aug 21, 1990 informing that she will be unavailable from Oct 1-31 (will get married) [89-50060] (ec)
9/26/90	CALENDARED: PASADENA, Nov. 9, 1990, 9:00 am Courtroom 1 [89-50060] (aw)
11/9/90	ARGUED AND SUBMITTED TO: NELSON, REINHARDT, Price [89-50060] (jhc)
9/15/92	FILED OPINION: VACATED, REVERSED AND REMANDED FOR FURTHER PROCEEDINGS (Terminated on the Merits after Oral Hearing; Other; Written, Signed, Published. Dorothy W. NELSON; Stephen R. REINHARDT, author; Edward D. Price, dissenting.) FILED AND ENTERED JUDGMENT. [89-50060] (ck)
9/24/92	Filed motion of Appellee for ext of time to file petition for rehearing until 10/29/92 and deputy clerk order: (Deputy Clerk: ec) granting motion. Subj to reconsideration. . . . [2213792-1] petition for rehearing due 10/29/92; (Motion recvd 9/22/92) [89-50060] (Panel) (ec)
9/24/92	notice of appearance of Mark D. Larsen as counsel for USA [89-50060] (ec)
9/24/92	notice of appearance of Dennis Landin as counsel for Pedro Alvarez Sanchez [89-50060] (ec)
10/29/92	[2234618] Filed original and 40 copies Appellee USA petition for rehearing with suggestion for rehearing en banc 15 p.pages, served on 10/28/92 (Panel; active judges) [89-50060] (ec)
1/22/93	Filed order (Dorothy W. NELSON, Stephen R. REINHARDT, Edward D. Price,): denying petition for enbanc rehearing and rejecting the petition for rehearing en banc. [2234618-1] [89-50060] (tsp)

DATE	PROCEEDINGS
4/19/93	Recvd ltr from SC re: cert has been filed. (case file) [89-50060] (tsp)
4/21/93	MANDATE ISSUED [89-50060] (tsp)
5/20/93	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 92-1812 filed on May 13, 1993. [89-50060] (ec)
10/15/93	Received notice from Supreme Court, petition for certiorari GRANTED on 10/12/93 (ah)

AO 91 (Rev. 11/82)

CRIMINAL COMPLAINT

United States District Court	DISTRICT: CENTRAL DISTRICT OF CALIFORNIA
UNITED STATES OF AMERICA V. PEDRO SANCHEZ ALVARES	DOCKET NO.
	MAGISTRATE'S CASE NO. 88-1102m

Complaint for violation of Title 18 United States Code § 472

NAME OF JUDGE OR MAGISTRATE	OFFICIAL TITLE	LOCATION
CHARLES F. EICK	United States Magistrate	Los Angeles, CA

DATE OF OFFENSE	PLACE OF OFFENSE	ADDRESS OF ACCUSED (IF KNOWN)
8/5/88	LOS ANGELES COUNTY	

COMPLAINANT'S STATEMENT OF FACTS CONSTITUTING THE OFFENSE OR VIOLATION:

Defendant PEDRO SANCHEZ ALAVARES, with intent to defruad, kept in his possession and custody 113 counterfeit $20 Federal Reserve Notes, falsely made, forged, and counterfeit obligations of the United States, as the defendant then and there well knew.

BASIS OF COMPLAINANT'S CHARGE AGAINST THE ACCUSED:

(See attached affidavit which is incorporated as part of this Complaint)

MATERIAL WITNESSES IN RELATION TO THIS CHARGE:

Being duly sworn, I declare that the foregoing is true and correct to the best of my knowledge.

SIGNATURE OF COMPLAINANT (OFFICIAL BADGE): STEVE PROCTOR

OFFICIAL TITLE: Special Agent - USSS

Sworn to before me and subscribed in my presence,

SIGNATURE OF MAGISTRATE[1]:

DATE: August 9, 1988

[1] See Federal Rules of Criminal Procedure rules 3 and 54.

AFFIDAVIT

I, Steve Proctor, being duly sworn and under oath, hereby depose and say:

1. I am a Special Agent (SA) of the United States Secret Service (USSS). I have been a Special Agent for ten (10) years. I am currently assigned to the Los Angeles Field Office, Counterfeit Squad. I have had formal training in the identification of counterfeit currency.

2. This affidavit is made in support of a complaint charging PEDRO SANCHEZ ALVARES with violation of Title 18, United States Code, Section 472, Possession of Counterfeit Obligations of the United States.

3. On August 8, 1988, SA Paul Lipscomb advised me that he received a telephone call from Deputy John McCann of the Los Angeles County Sheriff's Narcotics Unit, who stated as follows:

a. On August 5, 1988, subsequent to a search warrant being executed at 3025 Frazier Avenue, Apartment D, Baldwin Park, California, Pedro Sanchez Alvares was taken into custody for possession of one hundred thirteen (113) counterfeit $20 Federal Reserve Notes (FRNs). Deputy McCann further stated that the counterfeit notes were found wrapped in a brown bag in the right front pocket of a jacket, hanging in a closet in Alvares' apartment. McCann stated that Alvares told him that the clothing in the closet belonged to him. McCann also stated that he had rented receipts with Alvares' name on them.

5. On August 8, 1988, SA Lipscomb informed me that he had examined the one hundred thirteen (113) notes referred to above and that he determined them to be counterfeit. SA Lipscomb also advised me that he interviewed Pedro Alvares at the Industry Sheriff's Station with the assistance of Deputy Abraham Hernandez, a fluent Spanish speaker. SA Lipscomb advised me that on August 8, 1988, Deputy Hernandez advised Pedro

Alvares stated of his Constitutional Rights per Miranda, and that Pedro Alvares that he understood his rights, and agreed to answer questions; that Alvares admitted that he obtained the counterfteit money from a Jose Reyes and that he and Reyes counted the notes and separated the good quality notes from the bad quality notes, in Alvares' apartment. SA Lipscomb told me Alvares further stated that he was the owner of the jacket where the counterfeit money was found.

/s/ Steven Proctor
STEVEN PROCTOR
Special Agent—USSS

Sworn and subscribed to before me
on this 9th day of August, 1988

/s/ Charles F. Eick
United States Magistrate

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

June 1988 Grand Jury

CR 88-671

UNITED STATES OF AMERICA, PLAINTIFF

v.

PEDRO SANCHEZ-ALVAREZ, DEFENDANT

INDICTMENT

[Filed Aug. 19, 1988]

[18 U.S.C. § 472: Possession of Counterfeit Government Obligations]

The Grand Jury charges:

[18 U.S.C. § 472]

On or about August 5, 1988, in Los Angeles County, within the Central District of California, defendant PEDRO SANCHEZ-ALVAREZ, acting with intent to defraud, kept in his possession and custody 113 counterfeit twenty dollar ($20) Federal Reserve Notes, falsely made, forged, and counterfeited obligations of the United States, as the defendant then and there well knew.

A TRUE BILL

Foreperson

ROBERT C. BONNER
United States Attorney

ROBERT L. BROSIO
Assistant United States Attorney
Chief, Criminal Division

MANUEL A. MEDRANO
Assistant United States Attorney
Acting Chief, Criminal Complaints

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CR88-671-CBM

UNITED STATES OF AMERICA, PLAINTIFF

vs.

PEDRO ALVAREZ SANCHEZ, DEFENDANT

MOTION OF DEFENDANT TO SUPPRESS STATEMENTS SEIZED IN VIOLATION OF MIRANDA FOR *JACKSON v. DENNO* HEARING TO SUPPRESS STATEMENTS

BEFORE THE HONORABLE CONSUELO B. MARSHALL

Monday, October 31, 1988

APPEARANCES:

On behalf of the Government:

JIMMYE SANCHEZ WARREN
United States Attorney
1200 United States Courthouse
312 North Spring Street
Los Angeles CA 90012

On behalf of the Defendant:

Carol Klauschie
Federal Public Defender
1503 United States Courthouse
312 North Spring Street
Los Angeles CA 90012

ALSO PRESENT:

Paul J. Lipscomb
Special Agent, Secret Service

Irma Lourdes Garcia, Interpreter

Los Angeles, California, Monday, October 21, 1988

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[3] THE CLERK: Item No. 22, Criminal Number 88-671, United States of America versus Pedro Alvarez Sanchez.

Appearances, counsel.

MS. WARREN: Good afternoon, Your Honor. Jimmye Sanchez Warren appearing on behalf of the United States. With me at counsel table is Special Agent Paul Lipscomb, U.S. Service.

THE COURT: Good afternoon.

MR. LIPSCOMB: Good afternoon.

MS. KLAUSCHIE: Good afternoon, Your Honor. Carol Klauschie on behalf of Mr. Alvarez, who is present and has the assistance of a Spanish-speaking interpreter.

THE COURT: Good afternoon.

MS. KLAUSCHIE: Good afternoon.

THE COURT: The interpreter's name for the record, please.

THE INTERPRETER: Irma Lourdes Garcia.

THE COURT: And the language is Spanish?

THE INTERPRETER: Spanish, yes.

THE COURT: All right. The matter is here for a motion this afternoon, and the parties have filed certain points and authorities. Just for the record, [4] I'll indicate to you what I have because it appears that some things have been filed that the Court does not have.

I have the notice of motion and motion for *Jackson v. Denno* hearing that was filed on September 23rd by the defense. And then I have a motion to suppress statement seized in violation of Miranda points and authorities filed on the same date, September 23, by defense, the Government's opposition to the motion to suppress evidence, memorandum of points and authorities and declaration.

And then I also have a response to the motion of the *Jackson v. Denno* hearing filed on October 14th. And then filed on October 27th by the Government is a supplemental opposition to the Defendant's motion for *Jackson v. Denno* hearing.

Now, I understand that the defense has filed something subsequent to your initial filings as well, but it hasn't made it to my file. And we looked very quickly to see if we could find it and we have not, but I'm sure that counsel could provide the Court with an extra copy of the subsequent—

MS. KLAUSCHIE: Your Honor—

MS. WARREN: Your Honor, if there's something additional that's been filed by the defense, I have not received it either.

[5] MS. KLAUSCHIE: Your Honor, it's a reply to the Government's opposition filed October 20th. And I think that the Court did receive it but you didn't.

MS. WARREN: Oh, okay.

MS. KALUSCHIE: Your Honor, I apologize. I've asked that a courtesy copy be delivered to your Honor's chambers because of the short filing schedule. I did file a reply to the Government's opposition on October 20th pursuant to your request. I don't have an extra copy, but I'd be pleased to allow you to use mine, and I will certainly supply copies later.

May I approach?

THE COURT: You may.

I probably couldn't read it and listen at the same time, so why don't we do this. Why don't we proceed since it's

going to be an evidentiary hearing, and I'll hear all of the testimony. And then if time permits, I will review the copy that I don't have or, if necessary, take it under submission so that I can review that.

I should indicate that I do have—I'm not sure if it's one case or more than one that the clerk gave me this afternoon that apparently was provided to the clerk, I assume, by the defense. Am I correct?

MS. KLAUSCHIE: That's correct, your Honor.

THE COURT: Okay. All right. I'll permit [6] defense counsel to be heard.

MS. KLAUSCHIE: Your Honor, I think I can make things very simple very quickly. I have an interest in questioning Mr. Lipscomb on a few matters, but beyond that I'm prepared to submit on the declarations that counsel have provided and the exhibit which, unfortunately, you do not have before you, which I attached to my reply paper. That exhibit is a copy of the complaint with the supporting affidavit that was filed in this matter when Mr. Alvarez was first brought to your court.

With that understanding, I'm prepared to proceed—I'm prepared to submit on my motion regarding the Miranda issue. And the evidence that I'd like to elicit from Mr. Lipscomb has only to do with the issue as to delay under *18 U.S.C. 3501*.

THE COURT: All right. So counsel would stipulate that the declarations attached to your points and authorities may be received into evidence as the direct testimony of the witnesses or the declarants?

MS. KLAUSCHIE: Yes, your Honor.

THE COURT: And the Government would so stipulate?

MS. WARREN: Yes, your Honor.

THE COURT: All right. So, apparently counsel [7] would like to call the agent first, and he'll come forward.

THE CLERK: Please raise your right hand.

PAUL J. LIPSCOMB, GOVERNMENT'S WITNESS, SWORN

THE CLERK: Please be seated. Would you please state your name for the record and spell your last name.

THE WITNESS: Paul J. Lipscomb, L-i-p-s-c-o-m-b.

THE COURT: And the Court does have a copy of Mr. Lipscomb's declaration.

CROSS-EXAMINATION

BY MS. KLAUSCHIE:

Q. Mr. Lipscomb, what is the distance from the Industry sheriff's office to the courthouse; is that approximately 20, 25 miles?

A. At least, ma'am, yes.

Q. So that would be about a 20-minute to a half-hour drive?

A. Depending on traffic.

Q. And the traffic would depend on—the traffic on the Pomona freeway, isn't that the direct route from that sheriff's station to the courthouse?

[8] A. Yes, ma'am.

Q. Does the Secret Service field office—that's located at the 300 North Los Angeles Street building across the street from from us; is that correct?

A. Yes, ma'am.

Q. And the office there is on the fourth floor, the Secret Service—

A. Yes, ma'am.

Q. —office?

There was a phone available to you at the Industry sheriff's office, is that correct, during the time that you were over there—

A. Yes, ma'am.

Q. —receiving evidence?

And while you were there, you didn't make any attempts to call the United States Attorney's office, did you?

A. I did not.

Q. You're aware that a United States Attorney is always on duty to receive incoming phone calls and information about complaints from officers; isn't that correct?

A. Yes, I am.

Q. During the questioning that occurred there, there were four law enforcement persons present; isn't [9] that true?

A. Yes, ma'am.

Q. There was no attorney present for Mr. Alvarez.

A. No, ma'am.

Q. And the questioning that occurred there concerned both counterfeit money as well as narcotics; isn't that correct?

A. Yes, ma'am.

Q. Was the car that you drove in to the Industry sheriff's station the same car that you drove back to your office in after you were done questioning Mr. Alvarez?

A. Yes, ma'am.

Q. Did you have any problems with the car in terms of operating or transportation problems?

A. No, ma'am.

Q. Mr. Hernandez was the person who did the interpeting for the officer; is that correct?

A. Yes, ma'am.

Q. He is the fluent speaker among the four of you—

A. Yes, ma'am.

Q. —in Spanish.

None of the rest of you are fluent speakers in Spanish?

[10] A. No, ma'am.

MS. KLAUSCHIE: You Honor, I have no further questions.

THE COURT: Any redirect by Government counsel?

REDIRECT EXAMINATION

BY MS. WARREN:

Q. Agent Lipscomb, do you remember about how long it took you to make that drive to the City of Industry?

A. Somewhere between 40 and 55 minutes because of the amount of traffic that afternoon.

Q. That was on your return from the City of Industry sheriff's office to—or police department to your office at Los Angeles Street; is that correct?

A. Yes, ma'am.

Q. Okay. Did you call the U.S. Attorney's office sometime on the 8th to inquire regarding the issuance of a complaint against this Defendant?

A. I did.

Q. About when did you do that, do you remember?

A. In the mid to latter part of the afternoon of the 8th.

Q. Did you obtain permission from the U.S. Attorney's office to prepare a complaint against Mr. Alvarez Sanchez?

[11] A. I did.

Q. Did you also make inquiry to determine whether if you had time to adequately process Mr. Alvarez Sanchez—prepare a complaint and affidavit—whether he could be brought before the Magistrate for arraignment that afternoon?

A. Yes, ma'am, I did. I placed a call to the Clerk's office, advised them of what I had. The clerk told me at that time that there was not room on the calendar that afternoon and to bring the Defendant before the Magistrate the first thing the following morning, that would be the 9th of August.

Q. For clarification, which clerk are you talking about?

A. The criminal clerk here in the—on the Main Street office of this courthouse.

Q. In the Clerk's office then, isn't it?
A. Yes, ma'am.
Q. Not the U.S. Attorney's office?
A. No, ma'am.
Q. Okay. At any point during the time that Mr. Sanchez was being interviewed, did he request counsel?
A. He did not.
Q. At any time did he say that he wished the interview to proceed no further?
[12] A. He did.
Q. And what happened at that point?
A. We terminated—excuse me. I terminated the interview.

MS. WARREN: I have no further questions, Your Honor.

THE COURT: Anything further?

MS. KLAUSCHIE: Your Honor, that's—

MS. WARREN: Oh, I'm sorry. There is one line of questioning I forgot, your Honor, if I may.

THE COURT: Yes.

BY MS. WARREN:

Q. Agent Lipscomb, can you briefly describe to the Court the procedure that is followed in the preparation and filing of a complaint and taking of a defendant before the Magistrate for arraignment.

A. Yes, ma'am. Briefly, when a person is taken into custody by an outside agency, meaning not the Secret Service, an agent—in this case myself—is sent to the particular agency wherein we meet with the investigators and discuss the case at that time.

In this case, as in all cases, I then interviewed the suspect in the case. At that point in time we took the Defendant into custody and transported him to the L.A. field office. While at the L.A. field [13] office, an extensive preparation, such as a criminal history, fingerprints, photographs, as well as an interview, if in fact the person in custody at that time desires to be interviewed—in this case the Defendant did not and we did not interview him—but an extensive criminal history was taken—excuse me, ma'am—a personal history was taken from him. This took a little longer than usual because of the fact that I do not speak Spanish fluently and the Defendant does not speak English fluently.

At that time the defendant is then taken to L.A.P.D. Parker Center and housed overnight in case of an arraignment occurring on the following day. The defendant is picked up from L.A.P.D. Parker Center and then taken to the marshal's lock-up where he is reprocessed there and held until he is taken before the Magistrate assigned for the arraignment.

Q. I want to take you back in the procedure that you've just described and ask you to direct your comments not to what happened to Mr. Alvarez Sanchez, but to the procedures necessary, as you understand them as a Secret Service agent, for filing of a complaint.

From the point where you arrest an individual and take that person into custody, what is the next step in your procedure in preparing to bring that person [14] before a Magistrate for arraignment?

A. A complaint is prepared by the case agent. It is then given to a supervisor to review, and then is given to the secretaries in the Counterfeit Squad to type up. It is then re-reviewed by the case agent and the supervisor, and then taken to the U.S. Attorney's office for presentation for the filing.

Q. Is it possible to take someone in for presentation for arraignment before the Magistrate before a complaint has been prepared and filed?

A. No, ma'am.

Q. On the day that you arrested Mr. Alvarez Sanchez, do you remember approximately how long that booking procedure at the Secret Service office took?

A. On that date it would have to be, oh, approximately three to three and a half hours.

Q. Did you have to obtain someone to translate your questions to Mr. Alvarez and his responses?

A. I did.

MS. WARREN: I have no further questions, your Honor.

THE COURT: Anything further from the defense?

RECROSS-EXAMINATION

BY MS. KLAUSCHIE:

Q. Mr. Lipscomb, when you interviewed Mr. [15] Alvarez, you did that for the purpose of obtaining a confession; isn't that correct?

A. I'm not sure of your question, ma'am. At what time?

Q. At the time you interviewed him at the Industry sheriff's station, after you arrived, after you obtained the counterfeit notes, after you had met with Deputy Hernandez and McCann as you've described in your declaration, you then interviewed—Mr. Alvarez was then interviewed; is that correct?

A. Through Deputy Hernandez, yes.

Q. That's correct. And the reason that you did that was in order to obtain a confession from him; wasn't that your purpose?

A. No, ma'am.

Q. Your purpose in interviewing him was not to obtain incriminating statements?

A. At that time, no, ma'am.

Q. When you called the U.S. Attorney's office, you were already at the Secret Service field office; isn't that correct?

A. Yes, ma'am.

Q. So that was already after you left the Industry sheriff's station?

A. Yes, ma'am.

[16] Q. And when you called the Clerk's office to find out about the Magistrate's calendar, it was already 4:00 in the afternoon; isn't that correct?

A. No, ma'am. It was much earlier than that, by—I would say an hour and a half to two hours.

Q. So approximately what time did you call the Clerk's office?

A. Between 2:00 to 2:30 in the afternoon.

Q. Was there a supervisor on duty at the Street Service office the afternoon of Monday, August 8th?

A Yes, ma'am.

Q. And was there a secretary on duty the afternoon of Monday, August 8th?

A. Yes, ma'am.

Q. The affidavit in support of the complaint in this case is no more than four paragraphs; isn't that correct?

A. Yes, ma'am.

MS. KLAUSCHIE: Thank you. I have nothing further.

THE COURT: Anything further from Government's counsel?

MS. WARREN: Nothing further, your Honor.

THE COURT: All right. You may step down.

THE WITNESS: Thank you.

[17] THE COURT: Any further witnesses from the defense?

MS. KLAUSCHIE: No, your Honor.

THE COURT: Any further witnesses for the Government?

MS. WARREN: If I may have one moment, your Honor.

(Pause in proceedings.)

MS. WARREN: Nothing further, your Honor.

THE COURT: Both sides rest, then, as far as presentation of evidence?

MS. KLAUSCHIE: Yes, your Honor.

MS. WARREN: The Government rests, your Honor.

THE COURT: All right. Counsel wish to be heard in argument?

MS. FLAUSCHIE: Your Honor, again I apologize that the Court did not recive my reply papers. I believe that those papers bring to light the focus of what my argument is in regards to the voluntariness issue.

Your Honor, it is our position that the Government has not met its burden of proof under the preponderance of evidence standard in regards to the strictures of *18 U.S.C. 3501(c)* which, in particular, pertains to the admissibility of confessions, both in [18] terms of the traditional voluntariness issues, as well as for purposes of delay.

And in my papers I specifically address the issue of delay. And I did include a copy of a recent case by the Court of Appeals, *United States v. Wilson* which is, in my opinion, directly on point in this matter.

Your Honor, in the Wilson case, very similar to this case, a defendant was in custody for a significant amount of time before the arrest—excuse me, before an interview was conducted and the person was brought before the Magistrate for arraignment.

So that we don't get confused as to what the focus needs to be under this kind of test, the first question in deciding whether or not a confession is admissible pursuant to 3501 is whether or not the delay in bringing the person before a Magistrate was unreasonable. And the statute specifically says that a delay will not be held inadmissible if—or a statement will not be held inadmissible if the delay in bringing the defendant before a Magistrate is six hours or less from the time of arrest. If it's more than six hours, then the Court must look to the reason for the delay and may consider various factors. But the statute specifically says that a delay over six hours will not be [19] unreasonable where the Government has shown that the delay is caused by transportation problems.

In this case, your Honor, my client was in custody for over—almost 72 hours at the time that he was interviewed by the officers in this case. And the officers consisted of, pursuant to their declarations, two Los Angeles county sheriffs, one detective and a deputy sheriff, and two Secret Service agents.

The case law that I've provided to your Honor today as well as the Halbert case, which the Government cites in its reply, both state that the time in custody that is to be looked at in determining what delay counts is the time from arrest, detention. It doesn't matter whether the arresting agency is a state or local agency or federal agency.

So despite the fact that there was not a complaint filed, depite the fact that the federal agent did not have a complaint at the time he interviewed my client is not dispositive, because the time of filing the complaint is not the operative time. It's not the operative fact.

In fact, in the Wilson case which I will provide a copy of, your Honor. And for the record, I should tell you what that citation is. It's *838 F.2d 1081*, a Ninth Circuit 1988 case, the defendant was in [20] custody for a shorter period of time than Mr. Alvarez was in custody. I believe it was only about 22 hours.

He was arrested on a tribal assault charge, and he was held in custody overnight by the tribal authorities, and he was to be presented to a Magistrate the next morning on the tribal assault charge. And that arraignment was postponed to allow federal F.B.I.—the F.B.I. agents to come in and interview him. And the arraignment then was scheduled after the interview was over. And that interview happened and the arraignment happened within an afternoon's time.

He was later charged with a federal offense, and under the facts of that—under those circumstances, the Ninth Circuit held that that delay was unreasonable. The Ninth Circuit specifically found that the delay was for no other

reason than to obtain incriminating statements and confession. And I submit to your Honor that that's essentially what happened here.

In my reply papers, and I cite evidence that was available to the officers pursuant to the affidavit submitted by special—by Secret Service Agent Proctor, who was the agent who filed the affidavit in this matter, that the Secret Service was aware of several facts at the time that they arrived at the Industry Street—Industry station to look at the counterfeit money and subsequently [21] to interview my client.

The information that was available to them pursuant to the affidavit was as follows. And I will read this for your Honor, because your Honor doesn't have the benefit of my papers:

"They were notified that on August 5th, 1988, pursuant to a search executed at 3025 Frazier Avenue, Apartment D, in Baldwin Park, California, Mr. Sanchez was taken into custody for possession of 113 counterfeit twenty dollar Federal Reserve Notes." And I am reading verbatim from the affidavit.

"Deputy McCann further stated that the counterfeit notes were found wrapped in a brown bag in a right front pocket of a jacket hanging in a closet in Alvarez' apartment. McCann stated that Alvarez told him the clothing in the closet belonged to him. McCann also stated that he had rent receipts with Alvarez' name on them."

That information was conveyed to the Secret Service agent at some point the morning of Monday, August 8th. Again, three days after my client was arrested on the state offense pursuant the execution of a search warrant.

"When the Secret Service arrived at the Industry station"—according to Mr. Lipscomb's [22] declaration that happened between 11:00, 11:30 in the morning on Monday, August 8th—"at that point in time he met with the

deputies from the sheriff's office and he received the counterfeit notes that were found."

So even before he had met my client, he had received the counterfeit money, he had the information that had been conveyed to the Secret Service office through the sheriffs. And at that point, it's my position, your Honor, that he had sufficient information to go to the United States Attorney if he had been interested in proceeding with the statutory duty of bringing a person before a Magistrate at the earliest possible convenience.

Now I recognize that a person can't go right before a Magistrate on the whim of the defendant, there are some procedures that need to be followed. But there was nothing that prevented this office from calling the United States Attorney to tell them that Mr. Alvarez was in custody and that they had confirmed that the counterfeit was there.

They came to the Industry station with information that he had already made admissions, whether those were true or false is not at issue here, but nonetheless, they had that information. I see that there was no reason for him not to go forward with the [23] information he had, but for to obtain the incriminating statements from Mr. Alvarez at the time of the interview.

Even assuming that the time of travel from the Industry station to the federal courthouse would have been the same at 12:00 noon or 12:30 if he had left right after he had this information from the sheriffs, he would have been able to make it back to his office, which is no more than a block away from the courthouse, within a couple of hours and be able to get the paperwork and proceed.

I don't think it's an excuse for the officer to say that the clerk wouldn't allow him to proceed. The statute doesn't contemplate that a person cannot be arraigned after a 72-hour delay simply because there's a crowded calendar.

The U.S. Attorney has an obligation, just as law enforcement does, to follow through with the statutory procedures, and the Wilson case speaks to that in very strong language.

In the Wilson case, Judge Goodwin, who is the author of the opinion, states specifically in a note that "We would not sanction delay of any kind and continue to scrutinize for reasonableness delays over six hours which are not made necessary by transportation problems."

The evidence is clear here that there was no [24] problem with transportation. The cars worked; there was no problem with secretaries; there was no problem with supervisors to review the paperwork; no problem with the phone not being available to call in and notify in advance any persons necessary to get the paperwork rolling; no problem with contacting United States Attorney's office. No problem with doing it the next morning after Mr. Alvarez spent yet another night in custody.

Your Honor, I think based on the Wilson case, the delay in this case cannot be deemed to be reasonable under the authority. The Fauche case is consistent with that opinion. And again, under that decision and the Halbert decision, we're not talking about the time that the person is brought into federal custody. That's not the critical fact. The critical fact is when the person is brought in detention.

Your Honor, to further point in the direction of the *Fauche* case where the statement was held to be inadmissible pursuant to 3501 because a delay was unreasonable, in that case the defendant was in custody 20 hours. He had been questioned twice, and at least in one instance there had been a waiver of Miranda rights where the Court had made a finding that, althought equivocal, there was a valid Miranda waiver.

[25] In that statement, pursuant to that waiver, the defendant had admitted one bank robbery. He was held in custody overnight, and rather than being brought to

court promptly for the next arraignment calendar, he was picked up late by the F.B.I. agents who were handling the case. And on the way to the courthouse during a 15-minute drive from Parker—from where he was being held to the courthouse, he admitted two additional robberies.

The Court found that that delay in bringing him to the courthouse, where he was not picked up until 11:00 A.M. in the morning and therefore missed the 10:30 A.M. arraignment calendar, was sufficiently unreasonable given the obvious purposes for the delay. And in that case the Court found that the agents had spent the morning trying to investigate other robberies, and that they didn't go pick him up right away the next morning for the sole purpose of being able to question him later.

Your Honor, I'm not saying that it's not within the realm of law enforcement agencies to be able to complete their investigation, and if that includes seeking statements from defendants, then obviously they have the privilege to do that. My point in this case is that this man was already in custody over 72—approximately [26] 72 hours at the time that he was met by these agents.

The case law is clear that the time is attributable to the federal agents and that any delay over six hours can be presumed to be unreasonable unless there's problems with transportation. Again, the pivotal fact is not whether a complaint is filed.

In the Wilson case, Judge Goodwin specifically states that "The purposes embodied in Section 3501 to prevent confessions extracted due to prolonged pre-arraignment detention and interrogations, and to supervise the processing of defendants from as early a point in the criminal process as is practicable, are frustrated when the arraignment of a defendant who has been in custody for more than six hours is further delayed for no purpose other than to allow further interrogation of the defendant." If we continence the policy, the police procedure followed

here, we give officers a free hand to postpone any arraignment until a confession is obtained. And that's not what the legislative intent behind 3501 is.

There are other factors that the Court must take into consideration—excuse me, under the Wilson, Halbert and Fauche authorities which we've cited, the Court can use delay alone to find involuntariness under [27] the statute. That can be the sole basis.

The Court does not—if the Court wishes to move on, there are other factors that can be considered and there are five listed in the statute. The first is delay. The second is whether or not the person is advised of what they are being charged or arrested for.

In this case, as Mr. Lipscomb stated on the witness stand, my client was questioned about both narcotics and counterfeit. There's no evidence that he was advised of what charges he was being questioned about. It seemed to have been a general conversation based on both the circumstances of the arrest warrant and the discovery of the counterfeit money.

Another factor is whether or not the person is adequately advised of the fact that a statement could be used against them, that's the third factor. A fourth factor is whether the suspect is advised of the fact that they have a right to counsel present. And the fifth factor is whether in fact a lawyer is present.

Now in this case, as was true in the Wilson case, some of these factors cut both directions. We have filed a motion for suppression of statements pursuant to Miranda, and I will submit on that based on our papers. But even assuming the Court finds that Mr. Alvarez was sufficiently Mirandized and did intelligently and [28] knowingly waive his rights, the Wilson court states that that is not conclusive.

In fact, in their opinion, the longer a person is in pre-arraignment custody, then the more suspect an adequate waiver of Miranda is. And that's noted on Page 1085—

1086 and 1087 of the opinion where the Judge states: The Government's reliance on a waiver of Miranda rights becomes weaker as the period of pre-arraignment detention increases.

Even assuming that Mr. Alvarez was adequately Mirandized, he did not have a lawyer present, so that the delay in this case was unreasonable. And there is no evidence before the Court that Mr. Alvarez was advised of the charges of which he was being suspected.

And as your Honor knows, and as I know, and as the Government attorney knows, the subject matter of counterfeit money of drugs can encompass a wide variety of offenses from possession to delivery, to transporting, to sales, to all sorts of things. And there's no evidence here that he was advised as to what particular thing and what particular offense he was being questioned in regards to.

Briefly, your Honor, the Government notes a couple of cases in their reply to my response—their response to my reply; the Edwards case, which is a Ninth [29] Circuit case, and the Davis case, which is a Seventh Circuit case. And I briefly point out that in *Edwards—Edwards* was distingiushed in *Wilson* as well—but in *Edwards* the delay was only seven hours from arrest to arraignment.

And in that case the Court made a specific finding that the delay was reasonable because the defendant was arrested on a reservation, and the nearest Magistrate was 125 miles away in Tucson, Arizona. And that there was sufficient finding of transportation problems and inadequacy of staff to get the defendant to the Magistrate at a more reasonable time.

And the Davis case, I would submit, is not controlling, it's not—certainly not binding on this Court as it's an out-of-circuit case. That aside, the delay in that case was only two hours. That's substantially different than 96 hours which is the time for my client's arrest to when he was arraigned, approximately 96 hours.

Your Honor, in closing, I have also provided to your Honor and to the U.S. Attorney a copy of the Helmandollar case, which is a recent case of the Ninth Circuit, which does not specifically deal with the issue before your Honor, but has to do with whether a plea agreement, which the defendant claimed was entered into [30] between he and the Secret Service was enforceable or not.

In that case, the defendant entered a conditional plea based on very, very strong prestatement evidence, and the question was whether or not certain promises that he claimed were made to him were sufficient to bind the Government in terms of a plea. But that case is instructive in this case for the followng reasons.

In *Helmandollar* the defendant was arrested and held in custody for approximately 28 hours from the time of arrest until he was brought in before a Magistrate. He was advised of his Miranda rights by the Secret Service agents and repeatedly asserted them. He was questioned to long hours and finally after this discussion about a so-called plea agreement, he did, in fact, make statements that were incriminating to him.

In the response to the Defendant's motion to enforce the plea agreement, the declarations of the Secret Service agents made clear that they did that on purpose, that their reason was to get the source of the counterfeit. The reason was to get to the source before it would—they would not be able to preclude the evidence. And they purposely violated his rights, knowing full well that the exclusion would be available to him if he had chosen to proceed at trial. And the Ninth Ciruit, in very strong language, condemned that [31] activity.

I'm not saying that any of the agents in this case were involved in that case, because to my knowledge they were not. But I bring it up for the purpose that the Secret Service is on notice because of that case. They've got to follow the rules, and the rules are to bring a person before a Magistrate, to do whatever it takes within the statutory time frame.

And quite frankly, I—I cannot conceive—I can't think of any reason—and I've thought about this for a couple, three weeks now since we've had the date continued—what reason they needed to talk to my client given the information they had. I've seen compaints in this courthouse on much skimpier information than what the agents knew when they arrived at the sheriff's station approximately 11:30 in the morning on Monday, August 8th.

And I think the evidence is clear that had they—had they been concerned with their—with the statutory duty to bring the Defendant before the Magistrate as soon as possible, there would have been no problem in getting it before the Magistrate.

Certainly if the U.S. Attorney had called the Clerk's office and said: We need this on calendar, this guy's been in custody for 72 hours, there would have been [32] no problem in getting the case on calendar. Certainly if it had been brought to the attention of the Public Defender, it would have been placed on calendar.

Your Honor, unless the Court has questions, I'm prepared to submit on that matter, and I'd love to give the Court a copy of my paper so that you can follow.

THE COURT: All right. I have no questions.

MS. KLAUSCHIE: Thank you.

THE COURT: Government's counsel.

MS. WARREN: Your Honor, under 3501(c)—well, 3501, the primary issue to be determined by the Court is the voluntariness of the confession. 3501(c) establishes a means—well, it was initially passed by Congress, according to all legislative history and as set forth in the cases that have been cited to the Court: in order to prevent courts from holding confessions involuntary, or from suppressing them because of a delay, solely because of a delay, up to six hours. And so the six-hour rule was established to remove the discretion of the Court in using delay as a grounds for suppressing a confession that was given less than six hours after arrest.

The statute then proceeds—and the Ninth Circuit has been very specific in its analysis of this part of the statute—it says that once the six-hour [33] rule—the six hours have passed, that does not mean that the Court then must suppress, it simply grants to the Court that discretion considering the delay. And then the test becomes one of reasonableness: Was the delay reasonable?

It is true that in the Ninth Circuit, unlike almost every other circuit that I could find in doing my research, the time spent in state custody—in a case such as this where a defendant is initially arrested by another agency and then turned over into federal custody—in this circuit alone, that time beginning from state arrest does count in determining the six hours.

However, I suggest to this Court that that time spent in state custody prior to the time that the federal agents even knew Mr. Alvarez existed, or that he was in custody, is a factor to be used by this Court in determining reasonableness. That is, if the Court is—if the test is what was the reasonableness of the actions of the federal agents? They could not have done anything reasonable or unreasonable prior to the time that they even knew the case existed.

And so it seems to me that the Court's analysis of the reasonableness of the delay must begin no earlier than the time that the federal agents learn about [34] the case. Beginning the analysis at that point, what did they do? They—as soon as they knew about the case, as soon as they knew about Mr. Alvarez, they immediately left the Secret Service office and they drove out to the police station where Mr. Alvarez was in custody. They met with the officers who had arrested him, looked at the evidence that was given to them, the counterfeit, and then began to interview Mr. Alvarez—according to the uncontradicted testimony—not for the purposes of obtaining a confession.

And I suggest to the Court that there are many reasons, which the Court in its experience as well as counsel can deduce for such an interview. It is not outside the realms of possibility that Mr. Alvarez could have given the agents information that would have deflected their investigation from him and onto another person. At the time that they began that interview, Mr. Alvarez was in the custody of the police. He was not in federal custody. They could not then have just grabbed him and left after the interview.

And again, it is uncontradicted that he was given his warnings in Spanish, that he understood them, that he voluntarily waived them, that he gave no indication whatsoever that he didn't understand why he was there. In fact, according to Deputy Hernandez' [35] declaration, he volunteered at booking Friday afternoon—or Friday night when he first went in that he was a former police officer from Mexico and he knew what this was about. And that same statement was made during the time that he was being questioned by Detective McCann—

MS. KLAUSCHIE: Excusee me, your Honor. I would object to that reference. I don't see that in Mr. Hernandez' declaration as to any statements made on August 5th.

THE COURT: All right. Counsel's—

MS. WARREN: Oh, excuse me, your Honor.

THE COURT: —objection is noted for the record.

MS. WARREN: Oh, okay.

Certainly, your Honor, whether it was made—those statements were made—and I believe the declaration supports it that they were made during the interview—in short, this Defendant showed absolutely no confusion, he made no effort at all to assert his right to counsel. As soon as he said he didn't want to say any more, the interview was terminated.

At that point, the agent brought him back and began the standard procedure. At that point, they arrested him

and took him into custody, not before. [36] Then, they took about the hour drive, considering traffic, and brought him back to the office. They went through the standard booking procedures that are followed in the case of every defendant. They called to find out if there was time to get him on the afternoon calendar, were told that there was not, and he was presented the next morning.

Your Honor, there are several distinguishing factors between the cases that have been cited by counsel and this case that I think should be brought to the Court's attention. Most specifically, I direct the Court's attention to *U.S. v. Wilson,* which is cited by both counsel in support of their positions. This is the case that was the 1988 case that was cited by Ms. Klauschie. I think it important to note that the Court found there as a matter fact, based upon the testimony of the agents, that the sole purpose of the delay in arraignment was to allow the agents to obtain a confession. That is certainly not the case in this instance.

There, the defendant was arrested the night before at that point in time on an assault charge, he was held overnight. Arraignment—normal arraignment calender there began in the afternoon, and the tribal—he was to be arraigned on the tribal charges, not on [37] federal charges, but on the tribal charges that afternoon. And the sergeant testified that he knew he was supposed to be arraigned on the tribal charges then, but intentionally held him for the interview so that the F.B.I. agents could interview him, and then took him up for a private arraignment in chambers after the interview was concluded. That was done solely for the purpose of obtaining a confession, according to the testimony of the sergeant and according to the finding of the Court. There is nothing in this record that would support such a factual finding here.

Even where the delay was unreasonable in Wilson, the Court finds that it must still look to the voluntariness of

the confession; that is, the primary, the overriding issue for this Court to determine is voluntariness. That's the primary issue, and that should be the issue that determines the Court's ruling on suppression. There is absolutely no evidence here of anything other than a free, knowing and voluntary waiver of rights and confession that was given in this case.

Helmandollar, cited by counsel today, I submit to this Court is very fact-specific. There, the amount of currency that was found was $3.7 million in counterfeit currency. And the agents testified that they intended to continue questioning regardless of the effect [38] on the eventual suppression of evidence because it was so important to them to find out where that much currency was coming from. There is nothing in this record—first of all, *Helmandollar* doesn't even discuss 3501, it doesn't discuss delay and arraingment, and it doesn't—at all. Those issues are not addressed there.

And secondly, there is nothing to show that there's any relationship between this case and the case so far. *Helmandollar* showed that the agents made a conscious decision to continue questioning, even if it resulted in eventual suppression, because they had what they thought at the time to be a more important issue in mind, to find out where almost $4 million in counterfeit currency had come from. There's nothing comparable to that in this case at all.

I submit that it's shown just to show that at one point some Secret Service agent violated the rules in talking to a defendant, but it does not show anything about what happened to Mr. Alvarez; no evidence that the same agents are involved. The testimony of Agent Lipscomb is that his—the purpose, the primary purpose of his interview was not to obtain a confession. The statement was made in a free and voluntary manner. There is absolutely nothing to establish anything to the contrary from that.

[39] Mr. Alvarez was told of his rights. He stated that he knew what the interview was about, that he knew what the process was because he was a former police officer in Mexico. And he talked freely and openly for a period of time until they began asking him questions that he chose not to answer, and then he asserted his rights and the interview was terminated.

And I think there's probably nothing in the facts of this case that show more dramatically how voluntary that waiver was than the later assertion of his rights during the interview, and the immediate response of the agents to the assertion of that right. As soon as Mr. Alvarez chose not to answer any more questions, the interview was terminated.

I believe that shows more dramatically than anything else could that Mr. Alvarez knew very clearly what his rights were, that he made an initial waiver of those rights freely and voluntarily and knowingly. And when in his judgment it was no longer to his advantage to waive them, but rather became to his advantage to assert them and he did so, they were honored promptly. Immediately the interview was terminated according to the declarations that were filed. And there's absolutely no evidence in this Court's record to the contrary.

Your Honor, I submit that the, quote, [40] "delayed," close quote, in arraignment here was reasonable given the circumstances. The agents acted promptly, as soon as the interview was terminated, to begin the standard booking procedure, to transport him, to book him, to take the history, to prepare the complaint and affidavit, to call regarding the calendar. And when told to bring him in the next morning, that's what they did. That even if the delay were held by this Court to be unreasonable, the overriding question for this Court to consider, according to Wilson and according to the statute, is the voluntariness of the confession. And there is absolutely no evidence in this record to show that this confession was anything other than voluntary.

Your Honor, I direct the Court's attention to Page 1084 of *U.S. v. Wilson*, which is the case cited and relied upon by Defendant. Therein the Court says: Discretion remains in the trial judge under Subsection 3501(b), to exclude confessions as involuntary solely because of delay in arraignment during which a confession is given that exceeds six hours. And I submit to the Court that the confession having been given prior to arrest by federal agents was not given pursuant to a delay or during a delay in arraignment.

I would add that the Court in Wilson lists the [41] five statutory factors. It says that those are the primary things to be considered by the Court. First, "the time elapsing between arrest and arraignment if the defendant making the—of the defendant making the confession if it was made after arrest and before arraignment." Two, "Whether the defendant knew the nature of the offense for which he was suspected at the time he was making the confession."

Your Honor, there's no law cited to the Court to show that the defendant has to know the specific charge that's going to filed. The question is whether the defendant knew the nature of the investigation. And it's clear that he knew that. He knew he was being questioned about drug charges on which he'd been arrested. He knew he was being questioned about the currency which was found in his possession.

Whether or not he was advised or knew that he was not required to make any statement and that such statement could be used against him is Factor Number 3. Clearly he was advised of that, there was both a written and an oral waiver. Clearly he knew he was not required to make a statement because during the interview he decided to terminate the questioning, he decided to stop making his statement, and the interview was terminated.

The fourth factor is whether or not he was [42] advised prior to questioning of his right to the assistance of counsel. It is uncontradicted here that he was so advised,

and that he thought he made a written and an oral waiver of that right.

And finally, whether he was without the assistance of counsel when questioned and when giving such confession. Granted he was without assistance of counsel, but that was by his choice.

Your Honor, we submit that a knowing and voluntary waiver of rights, followed by a voluntary confession, should not be suppressed solely because of the brief delay—if such is found to be here—as a result of following standard procedures in booking, preparation of a complaint and arraignment.

If the Court has no questions, I would submit.

THE COURT: I don't have any questions.

MS. KLAUSCHIE: Your Honor, although the Government would surely like the Court to begin counting the time here for purposes of the strictures of 3501, that's simply not the law. And for your Honor's information, I would cite *U.S. v. Fauche,* which I've provided a copy to you. I believe the relevant page is 1406. And there specifically the Ninth Circuit stated—and this is in part the facts of that case—"the Government contends the District Court erred in [43] aggregating the three hours Fauche spent in federal custody with the 17 hours he spent in local custody in finding unreasonable pre-arraignment delay. The contention fails.

"This Court has explicitly held that pre-arraignment delay caused by federal and local officials should be considered cumulatively under Section 3501(c). The District Court did not err in aggregating Fauche's time in local and federal custody—local and federal custody for purposes of determining unreasonable delay under Section 3501."

It's simply—it's not—it is not correct legal standard to begin calculating the delay at the time the Secret Service agents were notified of Mr. Alvarez and the seizure of the counterfeit money at the time of the execution of the search warrant three days earlier.

Your Honor, in terms of the interview that afternoon, there has been no reason that has been provided to us by the Government as to why that interview was necessary but for to obtain other information from this Defendant. And, in fact, that's more or less been conceded.

And in the Wilson case, the Court specifically says that: The desire of an officer to complete interrogation is the most unreasonable reason for [44] delaying bringing a person before a Magistrate of all of the things that can be considered in deciding whether or not the statement is admissible or inadmissible.

If it was not the reason to obtain a confession, or to obtain some incriminating information, as the U.S. Attorney suggests, perhaps someone else who might have been involved. I mean, that by itself implicates the person in knowledge of certain activities.

Why did they question him? They already had information from the detectives from the arrest, from certain statements that were allegedly made spontaneously, which are included in the complaint and affidavit which I attached as an exhibit to my reply, they had the counterfeit money. They had some information about so-called statements my client had made, which are not at issue here. What reason did they have to interview this person further but to obtain further information.

Interrogation means custodial questioning for the purpose of eliciting incriminating responses. How could—what—a person in custody can do little more than incriminate himself when he's being questioned regarding an offense.

It is true that the Court can consider factors outside of the delay itself. And in this case I'd simply [45] point out the long delay here, as is noted in Wilson, certainly undermines the validity of a Miranda warning when a

person is not even approached for questioning until after three days of being in county custody.

The questioning took place in an interview room. Interview rooms are notoriously small with not very—without windows and certain small amounts of furniture. There were four officers present during this questioning, four officers and my client. There was a general discussion about evidence. There's no evidence that there was an advisement of what he was being—what potential charges would be against him, and there was no attorney present.

In the Wilson case, the Court noted that there was no specific finding as to whether the defendant had been advised of what the charges were. And the facts leading up to that comment, I believe, that the defendant had been questioned both by the tribal authorities as to the offense at issue there which had to do with the child beating, specifically the defendant's son, and then was later interviewed by the F.B.I. agents. And the Court made a finding there that the defendant had not been advised of what specific thing he was being charged with.

Your Honor, I simply mention this because the Wilson case notes that these factors can be taken into [46] account, they don't preclude a finding of involuntariness and that the delay is a critical concern; specifically, when there's no apparent reason for the delay but for to obtain more information from the defendant. The delay in this case was 96 hours, and the delay in that matter was deemed to be unreasonable. The delay in the Fauche case was 20 hours, and that was deemed to be unreasonable.

Certainly in light of those factual—those factual circumstances, this case is clearly, clearly on par with those decisions.

One other matter, your Honor, is that it's noted in Agent Hernandez' declaration that my client didn't read the Spanish. In the Wilson case, the Court pointed to

various factors that tended to support a fact that the person that was being interviewed was not a highly educated person. And there's no evidence that that person had ever been in custody before. There's no evidence in this case that Mr. Alvarez had ever been in custody before and was familiar with the procedures of being a charged person in custody.

And for your Honor's information, we do not agree with all of the alleged statements. The factual statements that were—are alleged by the officers, [47] including the statement of being an officer and knowing everything that was going on. I mean, that—we are not—this is not the appropriate time to make those factual disputes, but if the time arises, then they will be there. And so that, I believe, is irrelevant for the purposes of this hearing.

Your Honor, I will submit on that.

THE COURT: I've now been provided with a copy of the missing papers, so I do now have the defense's reply to the Government's opposition to Defendant's motion filed on October the 20th. I do plan to take the matter under submission so that I can read those papers together with the cases that have been provided to the Court this afternoon.

Did Government's counsel wish to comment on something else?

MS. WARREN: Your Honor, because there three comments that were made that were not raised in her initial argument, there is a very brief argument I would like to make.

THE COURT: All right.

MS. WARREN: I raise this only because it appears to me that defense counsel is arguing facts that are not in the record. First—

THE COURT: And the Court is aware that [48] defense counsel made some reference to interview rooms and traditionally they are of a certain size and so forth.

If there is no evidence to indicate the size of this interview room, then obviously that's not something the Court would take into consideration.

MS. WARREN: Thank you, your Honor, that was the first of the three.

The second is the statement—the most important is the statement that they don't agree with the factual statements given, your Honor. There's been nothing, no evidence at all, presented to this Court other than the evidence presented in the declarations given by the Government and the testimony of Agent Lipscomb, all of which support the fact that this Defendant told the agents and the police that he had been—that he was a police officer in Mexico, that he knew what this was all about, and that he knew about the procedures.

And that, I believe, is the factual evidence upon which this Court—if those become important facts—should make its decision. Certainly not the evidence which is not under oath, the comments made by counsel. And that that would go to the statement about never having been in custody before because if one is an experienced police officer, one doesn't have to have been [49] in custody to know what interrogation procedures are.

Those are the final comments, your Honor.

THE COURT: Okay. Defense has the final word since it's defense's motion. If there's anything further, then I'll hear you. If not, I'll deem it submitted.

MS. KLAUSCHIE: Your Honor, I'm sorry, I meant no disrespect either to you or to Government counsel. I did submit on the declarations for the purposes of this hearing, and my position is simply—and I don't want to cause a ruckus about this—my position is simply that I am not challenging the version of the agents as to what statements were made. I'm just saying that there is some disagreement about that, and we do not wish to litigate it at this point. I'm prepared to submit on the declarations.

In terms of the interview room, I apologize. That's correct, there is no evidence as to that. I assume that would—the comments were more from a matter of common sense and experience than the basis of this record, and I apologize. I did not mean to mislead your Honor or make factual misrepresentations.

THE COURT: All right. The matter will be deemed submitted. Now, we don't have a trial date; is that correct?

[62] MS. WARREN: That's correct, your Honor.

THE COURT: Okay. I don't know if Mr. Levario has any suggestions as to a possible date for us to set the case for trial.

(Pause in proceedings).

THE COURT: Could counsel provide the Court with a time estimate for trial?

MS. KLAUSCHIE: Your Honor, my belief would be that it would be one and a half days at the most.

THE COURT: Okay. Government?

MS. WARREN: I would have said two days.

THE COURT: Okay. After the Court rules on the motion, then I'll ask the Governmet's counsel to prepare an order excluding time for whatever time period is left between today and the actual ruling. I think I already have signed an order that takes the Court up to—I'm not sure if it was last Monday of if it's up to today.

MS. WARREN: It's through today, your Honor.

MS. KLAUSCHIE: I believe it's today.

THE COURT: All right. Then I will work with the clerk in terms of trying to set a date, obviously, within the time requirements, keeping in mind the time estimate then is approximately two days for a selection of the jury as well as presentation of evidence.

[51] MS. WARREN: Yes, your Honor, that's that Government's estimate. I don't know how much time would be required by defense.

THE COURT: Defense counsel indicated a day and a half. I assume that that was—the total estimate is about two days; am I correct?

MS. KLAUSCHIE: That's correct, your Honor.

THE COURT: All right. Okay. Are there any time problems that either counsel has that maybe the Court should be aware of, or the clerk should be aware of, in selecting a date. For instance, if you have other trials ongoing or something that you're concerned might conflict with the date that we might select for setting this case.

MS. WARREN: Your Honor, Agent Lipscomb informs me that he is scheduled to be in trial with Assistant U.S. Attorney Bill Fahey on the 22nd of November for that week, and for that week would be unavailable.

I'm to be transferred into the Complaints Unit November 16th, and therefore, this trial will, in all likelihood, be transferred to another assistant if the trial is scheduled after that week.

THE COURT: After November 16th?

MS. WARREN: After the week of the 12th, which [52] is only two weeks away.

MS. KLAUSCHIE: Your Honor, my only calendar conflict would be November 15th, which is a matter in front of Judge Tashima for trial. I'm expecting that it will settle, but we haven't as yet taken that status, so I should plan on being available in the event it doesn't. But otherwise, I'm open.

THE COURT: Okay. Keeping those dates in mind, Mr. Levario and I will try to select a date that would be within the Speedy Trial Act, of course, keeping in mind the dates that various persons would not be available.

MS. WARREN: Thank you, your Honor.

THE COURT: Okay. The matter is being submitted.

THE CLERK: Please rise.

(Proceedings concluded at 4:13 P.M.)

[Certificate Omitted in Printing]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA vs. | Docket No. CR- 88-671CBM

Defendant's Name: PEDRO SANCHEZ-ALVAREZ | Social Security No. 654-90-5341

& Residence Address: Metropolitan Detention Center, 535 N. Alameda, LA, CA 90012 | Mailing Address: Calle Lazarus Cardenas, Municipio de Apasingan, Michoacan, Mexico

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date → MONTH DAY YEAR: Feb. 8, 1989

COUNSEL

☐ WITHOUT COUNSEL — However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL — Carol Klauschie, DFPD & Andrea Alba, interpreter (Name of Counsel)

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea. ☐ NOLO CONTENDERE ☒ NOT GUILTY

FINDING

There being a finding/verdict of ☐ NOT GUILTY. Defendant is discharged.
☒ GUILTY.

Defendant has been convicted as charged of the offense(s) of Possession of Counterfeit Government Obligations, in violation of Title 18, United States Code, Section 472, as charged in the one-count Indictment

JUDGMENT AND PROBATION/COMMITMENT ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the court that the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of: Twelve (12) Months.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of Three (3) Years, upon the following terms and conditions: (1) not commit any federal, state or local crimes; (2) comply with the rules and regulations of the U. S. Probation Office and Gen. Ord. 225; (3) cooperate with the rules and regulations of the Immigration & Naturalization Service (INS); (4 if excluded from the United States, not reenter the United States without the expressed permission of INS. Upon any reentry into the United States during the period of supervised release, the defendant is to report to the nearest U. S. Probation Office within 48 hours of his reentry; (5) the defendant shall participate in a program approved by the U. S. Probation Office for treatment of narcotic addiction or drug dependency, which may include counseling and testing, to determine if the defendant is using drugs; and (6) the defendant shall report to the U. S. Probation Office within 48 hours of release from confinement.

IT IS ORDERED that the defendant shall receive credit for time served commencing Aug. 5, 1988.
Defendant is advised of his right to appeal.

ADDITIONAL CONDITIONS OF PROBATION

It is further ordered that the defendant pay a special assessment of $ 50.00 to Clerk, U.S. District Court, 312 North Spring Street, Room G-8, Los Angeles, CA 90012. Payment of assessment is stayed.

In addition to the special conditions of probation imposed above, it is hereby ordered that the Standard Conditions of [illegible]

Signed by
☒ U.S. District Judge
☐ U.S. Magistrate

CONSUELO B. MARSHALL

Date FEB [illegible]

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

(CR-[illegible])

53

SUPREME COURT OF THE UNITED STATES

No. 92-1812

UNITED STATES, PETITIONER

v.

PEDRO ALVAREZ-SANCHEZ

Filed October 12, 1993

ORDER ALLOWING CERTIORARI

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

October 12, 1993

☆ U. S. GOVERNMENT PRINTING OFFICE: 1993 301157 60004

No. 92-1812

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

PEDRO ALVAREZ-SANCHEZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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40 pp

QUESTION PRESENTED

Whether a confession given to federal authorities while a suspect is in state custody awaiting arraignment on state charges must be suppressed as a result of delay between the suspect's original arrest by state authorities and his eventual presentment on the federal crime to which he confessed.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1812

UNITED STATES OF AMERICA, PETITIONER

v.

PEDRO ALVAREZ-SANCHEZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 975 F.2d 1396. The order of the district court (Pet. App. 41a-50a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 1992. A petition for rehearing was denied on January 22, 1993. Pet. App. 60a. On April 13, 1993, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including May 22, 1993. The petition was filed on May 12, 1993, and was granted on October 12, 1993. J.A. 55. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTE AND RULE INVOLVED

18 U.S.C. 3501 provides:

> (a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession * * * shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.
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> (b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.
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> The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

> (c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided*, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.
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> (d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.
>
> (e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

In pertinent part, Rule 5(a), Fed. R. Crim. P., provides:

> An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041. If a person arrested without a warrant is brought before a magistrate, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause.

STATEMENT

1. On Friday, August 5, 1988, officers of the Los Angeles Sheriff's Department obtained a warrant to search respondent's residence for heroin, heroin paraphernalia, and other evidence of narcotics distribution constituting a felony under California law. The warrant was executed later that afternoon and resulted in the discovery and seizure of narcotics, as well as rent receipts in respondent's name. The state authorities also recovered a total of $2,260 in counterfeit United States currency. Respondent was arrested based on his possession of the narcotics, and he was "booked" on that charge at approximately 5:40 p.m. He spent the weekend in the custody of state authorities. Pet. App. 54a, 57a.

Because of the counterfeit currency found during the search, the Los Angeles Sheriff's Department contacted the United States Secret Service on Monday morning, August 8, 1988. At approximately 11:30

a.m., Secret Service Special Agents Paul Lipscomb and John Bozzuto arrived at the Sheriff's Department and took possession of the counterfeit currency from the state authorities. The federal agents were then taken to an interview room, where they were introduced to respondent. At the request of the agents, a Spanish-speaking deputy sheriff advised respondent of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and served as an interpreter. Pet. App. 51a-52a, 54a-55a, 58a. Respondent stated that he understood his rights, that he knew "what this was all about" because he had been a police officer in Mexico, and that he was willing to talk to the agents and to sign a waiver of his rights. After respondent signed the waiver form, he admitted that he had known the currency was counterfeit, but he claimed that a friend had found it abandoned in a motel room. The agents terminated the interview shortly thereafter when respondent invoked his right to remain silent, explaining that he had no desire to implicate others. *Id.* at 51a-52a.

The Secret Service agents then arrested respondent. They took him from the Sheriff's Department to the Secret Service field office for booking, a drive that took approximately 55 minutes. Once at the field office, the agents took respondent's fingerprints and photographs, and obtained a brief personal history.[1] The agents also prepared a criminal complaint. At approximately 2:30 p.m., Agent Lipscomb telephoned the court to advise that respondent was in federal

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[1] The booking process took somewhat longer than usual in respondent's case, because the Secret Service agents had to obtain the services of a Spanish interpreter in order to elicit his personal history and other booking information. See J.A. 27-28.

custody and that he would be brought for an initial appearance before the magistrate that afternoon. The court clerk told Agent Lipscomb that the magistrate's calendar was full for the day and directed the Secret Service to take respondent to the magistrate the following morning. Respondent was lodged for the evening in the federal detention center and was presented on the federal complaint on Tuesday, August 9, 1988. Pet. App. 52a-53a; J.A. 25-29.

2. Respondent was indicted for unlawful possession of counterfeit currency, in violation of 18 U.S.C. 472. Prior to trial, he moved to suppress the statement he made while in the custody of the Los Angeles Sheriff's Department on the ground, *inter alia*, that the delay between his state arrest and his federal presentment rendered the confession inadmissible under 18 U.S.C. 3501(c). The district court denied respondent's suppression motion. Pet. App. 41a-50a. The court first rejected respondent's claim that he did not voluntarily waive his rights under *Miranda*, and concluded that his confession was voluntary. *Id.* at 43a-45a. Turning to respondent's Section 3501(c) claim based on the delay in presenting him to a federal magistrate, the court concluded that suppression was not warranted in this case. The court explained:

> [T]here is no evidence in the instant case that the delay in arraignment was for the sole purpose of obtaining a confession or was the result of oppressive police practices prior to obtaining the confession, or that the delay otherwise caused the confession.
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> Evidence * * * establishes that the defendant was taken into federal custody, transported, processed, fingerprinted and photographed immediately upon interrogation, and that arraignment was delayed until the next morning only because, due to the lateness of the day, the magistrate's calendar was full once booking was completed.

Pet. App. 49a. The court also noted that respondent "offered no evidence [of] a collusive arrangement between state and federal agents for purposes of obtaining the confession," and that "[t]he delay *after* the confession and before [respondent's] federal arraignment obviously ha[d] no effect on the prior confession and would not render it inadmissible." *Id.* at 50a. Respondent was subsequently convicted after a jury trial at which the confession was admitted.

3. A divided panel of the court of appeals reversed. Pet. App. 1a-40a. The majority concluded that respondent's confession was obtained more than six hours after his arrest, and that the government therefore could not invoke the six-hour "safe harbor" period provided by Section 3501(c), during which voluntary confessions "shall not be inadmissible solely because of delay in bringing [the arrestee] before a magistrate." The court rejected the government's contention that time spent by a defendant in state custody should be charged to the federal government only when "the defendant can show evidence of collusion between local and federal authorities." Pet. App. 20a n.8. Instead, the court concluded that periods of state and federal custody "should always be aggregated" in calculating the period of pre-presentment delay. That conclusion rendered the six-hour "safe harbor" period unavailable in this case, the court held, because respondent's confession to the Secret Service agents was not made within six hours of his arrest by state officers. *Ibid.*

Although the court noted that 18 U.S.C. 3501(a) provides that confessions "shall be admissible" if they are voluntary, it refused to apply that provision in this case, explaining that "[c]ourts must not make a fetish of construing statutes in a literal fashion," Pet. App. 9a, and that a literal interpretation of Section 3501(a) would nullify what the court believed was the negative implication of Section 3501(c) —*i.e.*, that some confessions may be inadmissible "solely" because of pre-arraignment delay irrespective of voluntariness. Pet. App. 9a-10a. The court concluded that suppression was justified in this case because, in its view, the delay that occurred "from Monday afternoon to Tuesday morning" was designed "specifically to provide federal officers with time to interrogate" respondent. *Id.* at 21a. That "avoidable and deliberate delay * * *, after a long period of custody," required suppression, the court concluded, lest the court "permit the prosecution to profit by its wilful violations." *Id.* at 22a.

The dissenting judge would have affirmed respondent's conviction. He found "no evidence that any delay in bringing [respondent] before the magistrate was used to lengthen the interrogation." Pet. App. 40a. Because respondent clearly knew the nature of the charges under investigation and readily admitted his involvement at the beginning of the interrogation, the dissenting judge would have held the confession admissible. *Ibid.*

SUMMARY OF ARGUMENT

I. The court of appeals concluded that a suspect's arrest by state authorities on state-law charges qualifies as the "arrest or other detention" contemplated by 18 U.S.C. 3501(c). That conclusion cannot be reconciled with the text of Section 3501(c), which makes clear that the relevant arrests are those that trigger a duty to bring the arrestee before a magistrate authorized to commit persons for "offenses against the laws of the United States"—*i.e.*, arrests for federal crimes.

Nor can the court of appeals' conclusion be reconciled with the legislative history of Section 3501, which shows that the statute was intended to override a line of cases in which this Court invoked its supervisory authority to suppress confessions produced by delays in presentment. Yet under those cases, prepresentment delay caused by state officers enforcing state law could not be attributed to federal authorities unless the defendant demonstrated that federal law enforcement officers induced their state counterparts to hold him illegally in order to secure a confession. The court of appeals anomalously interpreted Section 3501(c) as embodying a rule that is more favorable to criminal defendants than the supervisory rule that Section 3501 was intended to override.

II. Correction of the court of appeals' conclusion that the relevant arrest was effected by California authorities will preclude suppression of respondent's confession under Section 3501. See 18 U.S.C. 3501(d). But even if the arrest effected by California authorities is an "arrest" within the meaning of Section 3501, the court of appeals erred in ordering suppression in this case. The court of appeals relied on Sec-

tion 3501(c), which provides a "safe harbor" for confessions obtained after arrest and before presentment, if the confession occurs within six hours of the arrest. The court reasoned that the "safe harbor" provision must necessarily mean that pre-presentment confessions obtained more than six hours after arrest may be inadmissible solely because of the delay, even if the confessions are voluntary. The court also stated that suppression was warranted solely by the Monday-to-Tuesday delay that *followed* the confession in this case. Those conclusions are wrong for two reasons.

First, the negative implication drawn by the court from Section 3501(c) does not justify overriding the affirmative command of Section 3501(a) that a voluntary confession "shall be admitted in evidence." The court of appeals therefore erred in concluding that what Congress said in Section 3501(a) must give way to what Congress did *not* say in Section 3501(c). The district court in this case correctly found that respondent's confession was voluntary, and that is all that Congress required for its admissibility.

Second, even if a confession may be suppressed solely because of a delay in presentment, the delay between Monday afternoon and Tuesday morning was caused, as the district court found, by the need to complete respondent's booking and by the unavailability of the magistrate. That delay was therefore not "unnecessary," and it would not require suppression even if the confession had been obtained after the period of delay. In fact, however, the confession was obtained *before* the period of delay on which the court of appeals relied. In *United States* v. *Mitchell*, 322 U.S. 65 (1944), this Court held that any period

of pre-presentment delay that occurs *after* a confession cannot have had any role in producing the confession and therefore may not be used to justify its suppression. The rationale of that decision requires reversal of the judgment of the court of appeals.

ARGUMENT

I. RESPONDENT WAS NOT UNDER "ARREST OR OTHER DETENTION" WITHIN THE MEANING OF 18 U.S.C. 3501 WHEN HE CONFESSED, BECAUSE HE WAS IN THE CUSTODY OF STATE OFFICERS WHO ARRESTED HIM SOLELY FOR VIOLATIONS OF CALIFORNIA LAW

Rule 402 of the Federal Rules of Evidence provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

The confession respondent gave to the Secret Service agents while he was in state custody was indisputably relevant to the crime for which he stood trial. Moreover, the court of appeals did not rule that the Constitution, any other rule of evidence, or any rule prescribed by this Court pursuant to statutory authority required the exclusion of that evidence. The court of appeals relied instead on an Act of Congress, 18 U.S.C. 3501, and on the "concerns expressed in * * * Fed. R. Crim. P. 5." Pet. App. 21a-23a & n.9. Because nothing in Section 3501 or Rule 5 requires suppression of a voluntary confession made by a suspect while he is in custody in connection with state law charges, the court of appeals erred in holding respondent's confession inadmissible at trial.

A. The Language Of Section 3501 And Rule 5 Does Not Support The Court Of Appeals' Conclusion That State Arrests Trigger Federal Presentment Obligations

Section 3501 of Title 18, entitled "Admissibility of confessions," provides in subsection (a) that in any federal prosecution, "a confession * * * shall be admissible in evidence if it is voluntarily given." 18 U.S.C. 3501(a). Subsection (b) provides that in determining the issue of voluntariness, the trial judge must take into consideration all the circumstances surrounding the giving of the confession, including the time between arrest and arraignment, if the confession occurred after arrest and before arraignment; whether the defendant knew the nature of the offense of which he was suspected when he made his confession; whether the defendant knew he was not required to make a statement and that any statement could be used against him; whether the defendant had been advised prior to questioning of his right to the assistance of counsel; and whether the defendant was without counsel when he was questioned. See 18 U.S.C. 3501(b).

Subsection (c) of Section 3501, the statute on which the Ninth Circuit relied, in effect creates a "safe harbor" period of six hours after arrest for law enforcement officers to present the arrestee to a magistrate. The statute provides that a voluntary confession given by a suspect within six hours of his "arrest or other detention * * * shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws

of the United States or of the District of Columbia." 18 U.S.C. 3501(c). The "safe harbor" period may be longer than six hours if the additional delay results from difficulties in transporting the arrestee to the magistrate or other officer. *Ibid.* Section 3501(d) further provides that nothing in Section 3501 "shall bar the admission in evidence of any confession made or given voluntarily by any person * * * at any time at which the person who made or gave such confession was not under arrest or other detention." 18 U.S.C. 3501(d).

In finding suppression to be required by Section 3501(c), the court of appeals reasoned as follows: (1) it held that the term "arrest" in Section 3501(c) refers not only to an arrest on a federal charge, but to any arrest on state or federal charges; (2) it noted that the period between respondent's arrest by state officers and his confession (three days) exceeded the six-hour "safe harbor" period in Section 3501(c); (3) it concluded that the negative implication of the "safe harbor" provision is that delays of more than six hours in presenting the arrestee to a magistrate may justify suppression of any confession obtained during that interim period; and (4) because it found that the pre-presentment delay in this case was both lengthy and unjustified, it held that respondent's confession had to be suppressed.

The court's analysis is flawed in a number of respects. First, and most importantly, the court was wrong in construing the term "arrest" in Section 3501 to include not only arrests for federal crimes, but also arrests for state law offenses. Section 3501 does not define the phrase "arrest or other detention," and we readily concede that, read in isolation,

it could encompass any incarceration, irrespective of the authority that justifies it. That reading, however, would conflict with the "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal* v. *United States*, 113 S. Ct. 1993, 1996 (1993). The context in which the phrase is used clearly indicates that the "arrest or other detention" must be of the kind that triggers an appearance before a judicial officer "empowered to commit persons charged with" federal or District of Columbia offenses—*i.e.*, before a judge authorized to grant or deny bail to those charged with crimes under federal authority. An arrest and ensuing custody by state officers enforcing their own laws—such as respondent suffered from Friday afternoon until Monday morning—does not trigger federal presentment obligations. It is therefore not the "arrest or other detention" of which Section 3501 speaks. Because respondent was not under "arrest or other detention" when he confessed, nothing in Section 3501 authorized suppression of his statements. See 18 U.S.C. 3501(d).

Rule 5(a), Fed. R. Crim. P., does not support the court of appeals' suggestion (Pet. App. 22a n.9) that an arrest on state charges triggers a duty to take the suspect to a federal magistrate for a speedy presentment[2] on any federal charges that might be war-

[2] The court of appeals' opinion, and some opinions of this Court, *e.g.*, *Mallory* v. *United States*, 354 U.S. 449, 454 (1957), refer to a defendant's first appearance before a magistrate generically as an "arraignment." A first appearance or "presentment" under Rule 5(a) differs from an "arraignment" under the federal rules. An "arraignment," which is the subject of Fed. R. Crim. P. 10, refers to the defendant's subsequent appearance before the court to enter a plea to charges set forth in an indictment or information. See 1 Charles Alan Wright, *Federal Practice and Procedure* § 71, at 76-77 (2d ed. 1982). When a defendant is presented before a magistrate pursuant to Rule 5(a), he has been arrested but usually has not been indicted. The defendant is therefore not called upon to plead to charges at that time. See Fed. R. Crim. P. 5(c). Instead, the magistrate conducting the presentment advises the arrestee of the complaint against him, advises him of his right to counsel, and advises him that he is not required to make any statement and that any statement he does make may be used against him. The magistrate also addresses the issue of bail and makes arrangements for a "preliminary examination," which is an adversary hearing to determine whether there is probable cause to hold the defendant to answer in the district court. See Fed. R. Crim. P. 5(c), 5.1.

ranted by the facts, much less the creation of an exclusionary rule to enforce that duty. Rule 5(a) requires that an arrestee be taken "without unnecessary delay before the nearest available federal magistrate," or before a state judge authorized to set bail for federal offenses under 18 U.S.C. 3041. If the arrest is effected without a warrant (as in the case of respondent's arrest by the Secret Service on Monday morning), Rule 5(a) also requires that a complaint showing probable cause be filed when the arrestee is brought before the magistrate.

As is clear from the actions it contemplates—the filing of a complaint under the federal rules and the setting of bail conditions under federal law—Rule 5(a) is part of "[t]he scheme for initiating a *federal* prosecution." *Mallory* v. *United States*, 354 U.S. 449, 454 (1957) (emphasis supplied). Thus, like Section 3501, the Rule is addressed only to arrests for viola-

tions of federal law; it does not control the actions of state officers enforcing their own laws. Cf. *Gallegos* v. *Nebraska*, 342 U.S. 55, 63-65 (1951) (plurality opinion). See also *United States* v. *Davis*, 437 F.2d 928, 931 (7th Cir. 1971) (Stevens, J.). Indeed, as this Court has recognized, the Rule is not violated by the failure to present a suspect who is questioned about a new federal crime while he is already in lawful custody for other charges under *federal* authority. See *United States* v. *Carignan*, 342 U.S. 36, 43-45 (1951). See also *Abel* v. *United States*, 362 U.S. 217, 225-230 (1960). The court of appeals therefore erred in concluding that a person who is in custody in connection with state charges is entitled under Rule 5(a) to a prompt presentment on any federal charges that might be brought against him, but for which he has not yet been arrested.

To construe the word "arrest" in Section 3501 and Rule 5(a) to include arrests by state officers for violations of state law would result in state arrests triggering federal presentment obligations in a broad range of cases. Especially when coupled with an exclusionary rule for confessions obtained in the interim (such as the court of appeals fashioned in this case), that result would introduce several anomalies into federal law.

First, excluding statements obtained while a suspect is in custody on state charges would not advance the goals of Section 3501. Federal officers may not learn of a suspect's existence, much less of the possibility that he committed a federal crime, until the suspect has been detained for some time on state charges. This case illustrates that problem, because it is undisputed that respondent was arrested on Friday by California authorities who were acting to enforce California narcotics laws, and that federal

authorities did not learn of his arrest or that counterfeit money had been seized until Monday morning. A rule that purports to "deter" federal officers from failing to present a suspect before a federal magistrate within six hours of the suspect's arrest on state charges penalizes federal officers for "violating" obligations of which they could not possibly have been aware. Such a rule would not rationally serve any purpose traditionally associated with exclusionary rules. See, *e.g.*, *United States* v. *Carignan*, 342 U.S. at 41-45; *Illinois* v. *Krull*, 480 U.S. 340, 347-355 (1987). See also *Abel* v. *United States*, 362 U.S. at 240.

Second, the rule adopted by the court of appeals effectively requires federal authorities to make an arrest and to file federal charges before they can interview a suspect as part of a routine investigation of alleged violations of federal law. Under the court of appeals' analysis, federal officers encountering a suspect who has been held in state custody for more than six hours may not be able to use any statement he makes to them even before they arrest him, and even if they present him to a federal magistrate immediately after his federal arrest. A court following the Ninth Circuit's analysis could hold the confession inadmissible on the ground that the defendant's state arrest preceded by more than six hours his presentment to the federal magistrate, and that the delay between the state arrest and the federal presentment required suppression under 18 U.S.C. 3501(c).

That result would be contrary to this Court's recognition that there is "no constitutional right to be arrested" as soon as the government obtains probable cause to believe that a suspect has committed a

crime. *Hoffa* v. *United States*, 385 U.S. 293, 310 (1966). See also *United States* v. *Lovasco*, 431 U.S. 783, 790-796 (1977). To the contrary, "[g]ood police practice often requires postponing an arrest, even after probable cause has been established, in order to * * * develop further evidence necessary to prove guilt to a jury." *United States* v. *Watson*, 423 U.S. 411, 431 (1976) (Powell, J., concurring). In order to develop such evidence, law enforcement officers are generally free to approach a suspect, as they would any other member of the public, and to make inquiry of him about the circumstances of a crime under investigation. See, *e.g.*, *Florida* v. *Bostick*, 111 S. Ct. 2382, 2386-2387 (1991).

The court of appeals did not dispute those principles, but it appeared to believe that they do not apply when law enforcement officers seek to question a person who is already incarcerated in connection with a different crime. There is no legal basis for such a distinction. The fact of custody may affect whether *Miranda* warnings are required before a detainee may be interrogated. But if the detainee is willing to waive those rights and speak to law enforcement officers, no legal principle heretofore recognized by this Court provides that they may ask him questions only if they first arrest him for the new crime, take him to federal court, and file a complaint charging him with that crime—as the court of appeals concluded in this case. See Pet. App. 22a n.9. On the contrary, in *United States* v. *Carignan*, *supra*, this Court rejected the contention that Rule 5(a) bars authorities from questioning an incarcerated person about a new crime if he has not been taken before a committing magistrate in connection with that crime. 342 U.S. at 43-45. That holding

is sufficient to dispose of the court of appeals' contrary conclusion in this case.[3]

Finally, the time of a defendant's "arrest" controls not only the requirement of presentment under Rule 5(a), but also the deadline by which an indictment must be filed under the Speedy Trial Act of 1974. See 18 U.S.C. 3161(b). Because both Rule 5 and the Speedy Trial Act address the timing requirements for starting a federal criminal prosecution, those timing requirements should be construed *in pari materia*. Accordingly, arrests on state charges should be treated similarly under the Rule and the Act.

The lower courts' cases construing the Speedy Trial Act consistently hold that arrests by state or tribal officers enforcing their own laws do not trigger the provisions of the Act, even when based on the same underlying conduct that later forms the basis for a federal prosecution. See, *e.g.*, *United States* v. *Charles*, 883 F.2d 355, 356 (5th Cir. 1989), cert. denied, 493 U.S. 1033 (1990); *United States* v. *Janik*, 723 F.2d 537, 542 (7th Cir. 1983); *United States* v. *Manuel*, 706 F.2d 908, 914-915 (9th Cir. 1983); *United States* v. *Adams*, 694 F.2d 200, 202 (9th Cir. 1982), cert. denied, 462 U.S. 1118 (1983); *United States* v. *Iaquinta*, 674 F.2d 260, 264 (4th Cir. 1982); *United States* v. *Wilson*, 657 F.2d 755, 767 (5th Cir. 1981), cert. denied, 455 U.S. 951 (1982);

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[3] Respondent was arrested by state officers in connection with the narcotics found in the apartment (Pet. App. 54a, 57a), and it was the probable cause for that arrest that justified the custody in which respondent was being held when he was interviewed by Secret Service agents. Respondent's position is therefore identical to that of the defendant in *Carignan*.

United States v. *Mejias*, 552 F.2d 435, 441 (2d Cir.), cert. denied, 434 U.S. 847 (1977). See also *United States* v. *Mills*, 964 F.2d 1186 (D.C. Cir.) (en banc), cert. denied, 113 S. Ct. 471 (1992). There is no sound policy reason for construing the term "arrest" differently in the context of the Speedy Trial Act than in the context of Rule 5(a) and Section 3501. In both settings, it is important to have a clear rule defining the initiation of federal criminal proceedings. Congress made federal arrest the starting point for purposes of the Speedy Trial Act; it would be anomalous to conclude, without strong supporting evidence, that Congress chose a different starting point for purposes of the presentment obligation and the law of confessions.

B. The History Of Section 3501 Is Inconsistent With The Court Of Appeals' Conclusion That State And Federal Custody Should "Always" Be Aggregated

Because the language of Section 3501, read in context, demonstrates that respondent was not under "arrest or other detention" in the relevant sense, there is no need to consult the legislative history for further guidance as to the statute's meaning. In any event, however, the legislative history of Section 3501, viewed against the background of the judge-made rule it was intended to replace, is inconsistent with the interpretation of Section 3501 adopted by the court below.

1. In *McNabb* v. *United States*, 318 U.S. 332 (1943), this Court, "[i]n the exercise of its supervisory authority over the administration of criminal justice in the federal courts," *id.* at 341, held inadmissible confessions obtained as the direct result

of federal officers' failure to comply with statutes mandating that an arrested person be taken promptly before the nearest committing magistrate.[4] The Court explained that the purpose of those statutes, and of similar state provisions, was to "check[] resort to those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use." *Id.* at 344. In the Court's view, those practices had in fact been used in *McNabb* to obtain the confessions at issue, *id.* at 344-345, and therefore "to permit such evidence to be made the basis of a conviction in the federal courts would stultify the policy which Congress has enacted into law." *Id.* at 345.[5]

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[4] The Court suggested that the supervisory power it invoked in *McNabb* derived from its authority to formulate common law rules of evidence for use in federal criminal trials. *McNabb* v. *United States*, 318 U.S. at 341. See also *United States* v. *Mitchell*, 322 U.S. 65, 66 (1944) (noting that *McNabb* "was merely another expression" of the Court's practice of formulating common law rules of evidence). That authority was established in *Funk* v. *United States*, 290 U.S. 371 (1933), and was sanctioned by Congress in former Rule 26 of the Federal Rules of Criminal Procedure.

[5] The Court had granted certiorari in *McNabb* to review a claim that the confessions were involuntary under due process standards, but avoided that issue by raising the prompt presentment issue *sua sponte*. The proceedings on remand revealed that the Court had been mistaken in the factual premise of its analysis—that the defendants were not presented before a commissioner promptly after their arrest. *McNabb* v. *United States*, 142 F.2d 904, 905-907 (6th Cir.), cert. denied, 323 U.S. 771 (1944). Scholars later took issue with the legal premise of the Court's analysis—that the prompt presentment statutes were intended to prevent prolonged interrogation or other third-degree practices. The legislative history of the

The statutes on which the Court relied in *McNabb* were superseded by the adoption of Rule 5 in 1946. The preliminary draft of Rule 5 had included a provision codifying the holding of *McNabb*, but that provision caused such controversy that it was omitted from the final draft submitted by the advisory committee to this Court, and from the criminal rules as adopted. See 1 Charles Alan Wright, *Federal Practice and Procedure* § 72, at 80-84 (2d ed. 1982). The Court nonetheless adhered to *McNabb* in the first case that reached it after the adoption of the new rule, *Upshaw* v. *United States*, 335 U.S. 410 (1948), where the Court reaffirmed the nonconstitutional basis for the doctrine (*id.* at 414 & n.2) and rejected the contention that *McNabb* had done "no more than extend the meaning of 'involuntary' confessions to proscribe confessions induced by psychological coercion as well as those brought about by physical brutality." 335 U.S. at 412.

The Court invoked the *McNabb* rule again in *Mallory* v. *United States*, 354 U.S. 449, 453-456 (1957), where it further explained the rationale for the rule. The Court quoted the language of Rule 5(b) (now found in Rule 5(c)) to the effect that the judicial officer must inform the defendant of his rights to counsel and silence, and also must advise him that any statement he makes may be used against him. *Id.* at 453-454. As the Court made clear (*id.* at 455),

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federal statutes at issue in *McNabb* indicates that they were intended "to prevent federal marshals from increasing their fees for transporting prisoners farther than necessary." Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 Colum. L. Rev. 1433, 1447-1448 (1984).

the defendant in *Mallory* had been denied those safeguards, which the prompt presentment requirement was designed to protect:

> [The defendant] was not told of his rights to counsel or to a preliminary examination before a magistrate, nor was he warned that he might keep silent and "that any statement made by him may be used against him." After four hours of further detention at headquarters, during which arraignment could easily have been made in the same building in which the police headquarters were housed, [the defendant] was examined by the lie-detector operator for another hour and a half before his story began to waver.

Not until the defendant confessed to the rape under investigation was he taken before a judicial officer—by which time, as the Court put it, the "caution" mandated by Rule 5(b) "had lost its purpose." *Id.* at 455. The Court therefore invoked *McNabb*'s exclusionary rule to reverse the conviction.

2. Consistent with its roots in this Court's supervisory power, the *McNabb-Mallory* rule focused on depriving federal officers of the fruits of their wrongdoing. The Court did not apply the doctrine to confessions obtained by state officers, see *Gallegos* v. *Nebraska*, 342 U.S. at 63-65 (plurality opinion); cf. *Crooker* v. *California*, 357 U.S. 433, 437 (1958), except when state officers illegally detained a suspect at the behest of federal agents. It was on that theory that in *Anderson* v. *United States*, 318 U.S. 350 (1943), decided the same day as *McNabb*, the Court required suppression of confessions made to federal agents while the suspects were in state custody.

In *Anderson*, federal power lines had been dynamited during a mining strike. Federal agents arrived

to investigate, and "[t]hereupon, on the same day," the local sheriff began to take strikers into custody, even though no state law permitted that action in the circumstances. 318 U.S. at 352 & n.2. The strikers were held for several days, during which they were repeatedly questioned by the federal agents; it does not appear from the Court's opinion that state officers participated in the interrogation, or indeed that they were endeavoring to solve any state crime. In those circumstances, the Court concluded that the record disclosed "a working arrangement" between federal and state officers that "made possible the abuses revealed by this record," and enabled the federal officers to secure the confession "improperly." *Id.* at 356.

The Court next considered the issue of confessions given by suspects in state custody in *Coppola* v. *United States*, 365 U.S. 762 (1961) (per curiam). In that case, the Second Circuit, sitting *en banc*, had upheld the admission of a confession made to a federal agent while the suspect was in the custody of the local police—custody that was itself illegal as a result of a failure of the local police to comply with a prompt arraignment requirement imposed by New York law. *United States* v. *Coppola*, 281 F.2d 340, 341 n.1, 344-345 (2d Cir. 1960). The suspect had been arrested by the local police on their own initiative, but on crimes both governments were investigating. In refusing to suppress the defendant's confession, the Second Circuit explained that the delay in presenting the defendant on state charges does not require suppression of a confession made to federal officers (*id.* at 344 (emphasis added)):

> That the Buffalo police notified the F.B.I. of the defendants' apprehension would be normal police procedure. Only by such an interchange of information can society be adequately protected against crime. * * * [And] [i]f this cooperation reached the point of arrest and detention by local police for the purpose of enabling federal officers to question the defendants * * * for a period of time forbidden to federal officers by Rule 5(a) * * *, admissions thus obtained would properly be excluded. * * * The rule excludes confessions when the "working arrangement" *includes the illegal detention*—in other words, when federal law enforcement officers *induce state officers to hold the defendant illegally* so that they may secure a confession. However, to bring a case within this rule there must be facts, as there were in Anderson, not mere suspicion or conjecture.

This Court granted certiorari, heard argument, and summarily affirmed. See *Coppola* v. *United States*, 365 U.S. at 762.[6]

3. That was the state of the law when Congress passed Section 3501 as part of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-

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[6] Significantly, the petitioner in *Coppola* had urged not only the existence of an improper "working arrangement" under *Anderson*, but also that the "working arrangement" requirement for inadmissibility should be overruled in light of this Court's decision in *Elkins* v. *United States*, 364 U.S. 206 (1960). See Brief for Petitioner at 26-33, *Coppola* v. *United States*, 365 U.S. 762 (1961) (No. 153 (O.T. 1960)). *Elkins* held that evidence seized by state officers in violation of the Fourth Amendment is not admissible in federal prosecutions, even if the federal government did not participate in the constitutional violation. This Court rejected that argument. See *Coppola* v. *United States*, 365 U.S. at 762 ("We find no merit in the other argument advanced by petitioner").

351, § 701, 82 Stat. 210. The House bill (H.R. 5037) and the Senate bill (S. 917) for what became that Act initially contained no provision relating to the admissibility of confessions. The House passed its bill without addressing that subject (113 Cong. Rec. 21,812-21,861 (1967)), but the Senate Judiciary Committee substantially revised the version passed by the House, adding provisions relating to the admissibility of eyewitness testimony (now 18 U.S.C. 3502) and Section 3501 relating to the admissibility of confessions.

The Senate Report that accompanied the legislation explained that Section 3501 was designed, *inter alia*, to counteract the effect on law enforcement of the decisions in *McNabb* and *Mallory*:[7]

> Voluntary confessions have been admissible in evidence since the early days of our Republic. These inculpatory statements have long been recognized as strong and convincing evidence—often called the best evidence of guilt. In *Mallory* v. *United States*, 354 U.S. 449 (1957), the U.S. Supreme Court declared inadmissible voluntary confessions made during a period of unnecessary delay between the time of arrest and the time the suspect is taken before a committing magistrate. * * *
>
> Enactment of subsection[] 3501 * * * is needed to offset the harmful effects of the *Mallory* case[.] * * *

[7] Because *McNabb* and *Mallory* were explicitly grounded on the Court's supervisory authority—a power that "exists only in the absence of a relevant Act of Congress," *Palermo* v. *United States*, 360 U.S. 343, 353 n.11 (1959); see also *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254 (1988)—Congress was confident of its authority to override them. See S. Rep. No. 1097, 90th Cong., 2d Sess. 40 (1968).

> After considering the testimony of many witnesses, and statements and letters of many interested parties, the committee found that there is a need for legislation to offset the harmful effects of the Court decisions mentioned above. These decisions have resulted in the release of criminals whose guilt is virtually beyond question.

S. Rep. No. 1097, 90th Cong., 2d Sess. 38, 41 (1968). In order to override the *McNabb-Mallory* line of cases, Congress provided that a confession "shall not be inadmissible solely because of delay in bringing such person before a magistrate," 18 U.S.C. 3501(c), and it also enacted the traditional requirement of voluntariness as the sole test for the admissibility of confessions. In the words of the statute, Congress directed that "[i]f the trial judge determines that the confession was voluntarily made it *shall be admitted* in evidence." 18 U.S.C. 3501(a) (emphasis supplied).

The record of the Senate debate on Section 3501 confirms that supporters and opponents of Section 3501 understood that the statute would do away with the judge-made rule embodied in the *McNabb-Mallory* line of cases, and that it would make delay in presentment merely one of several factors to be considered in assessing the voluntariness of a confession.[8] The Senate passed the statute substantially as

[8] See, *e.g.*, 114 Cong. Rec. 11,612 (1968) (remarks of Sen. Thurmond) (Section 3501 "would restore the test for admissibility of confessions in criminal cases to that time-tested and well-founded standard of voluntariness. * * * This provision would set aside the inflexible and technical rules established in the *Mallory* * * * decision[]"); *id.* at 14,016 (remarks of Sen. Stennis) (Section 3501 "will counteract the so-called

it was reported by the Judiciary Committee, except that an amendment was proposed by Senator Scott to limit to six hours "the period during which confessions may be received or interrogations may continue." 114 Cong. Rec. 14,184 (1968). That amendment, which was adopted without significant debate (*id.* at 14,184-14,186), was not coupled with any provision for the suppression of voluntary confessions obtained more than six hours after arrest, and there is no indication that any Senator believed that it would affect the voluntariness test set forth in Section 3501(a).[9]

Mallory rule, and put an end to the practice of discarding voluntary confessions of guilt because the police officers were not hasty enough in getting the defendant before a committing magistrate. Delay in taking the defendant before a commissioner would continue to be a factor in determining whether his confession was voluntarily given but it would no longer be the overriding issue. Mere delay would cease to be an absolute and automatic cause for excluding valuable and often essential evidence"); *id.* at 11,594 (remarks of Sen. Morse) ("[t]his provision would overrule the Supreme Court's decision in *Mallory*"); *id.* at 14,167-14,168 (remarks of Sen. McIntyre) ("Section 3501(c) also provides that a confession shall not be inadmissible in a Federal court solely because of any delay between the arrest and arraignment of the defendant, thus overruling the Supreme Court's decision in *Mallory*"). See also *id.* at 11,201 (remarks of Sen. McClellan); *id.* at 11,891 (remarks of Sen. Tydings); *id.* at 14,136 (remarks of Sen. Fong).

[9] Senator Scott was a member of the Judiciary Committee, and he concurred in the Committee's recommendations concerning the admissibility of confessions. He also wrote separately to express his views on the bill, including his view that a voluntariness test for confessions "keeps the balance true * * * [and] will enable the judge and the jury to search for the truth within the bounds of constitutional guarantees." S. Rep. No. 1097, *supra*, at 213.

The Senate then returned its version of the bill to the House, where the ensuing debate makes clear that the overruling of *McNabb* and *Mallory* was understood by all to survive Senator Scott's amendment. The sponsor of the earlier House version of the bill began the debate by stating that Section 3501 "turn[ed] the clock backward to the day before Mallory * * * and ma[de] 'voluntariness' the sole test as to the validity of a confession." 114 Cong. Rec. 16,066 (1968) (remarks of Rep. Celler). Other representatives agreed with that description of the effect of Section 3501, and they specifically adverted to the demise of the *Mallory* rule.[10] The House then agreed to the Senate version of the bill, 114 Cong. Rec. 16,271-16,300 (1968), and that version, which included Section 3501, became law.

4. The foregoing discussion demonstrates two propositions that together are fatal to respondent's case. The first is that even *before* Congress enacted Section 3501, the *McNabb-Mallory* doctrine did not

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[10] See, *e.g.*, 114 Cong. Rec. 16,273 (1968) (remarks of Rep. Rogers) ("Adoption of this change * * * would assign proper weight to the [*Mallory*] rule. Delay in bringing a suspect before a committing magistrate would be a factor to consider in determining the issue of voluntariness, but it would not be the sole criterion to be considered"); *id.* at 16,276 (remarks of Rep. Anderson) ("Section 3501 makes voluntary confessions admissible in Federal courts. This merely returns the law in these cases to what it was for more than 175 years * * *. Section 3501(c) does overrule the Mallory decision. * * * [I]t should be emphasized that the effect of this section, 3501(c) is merely to affirm the proposition that a confession cannot be ruled out solely because of a delay in presentment"); *id.* at 16,274-16,275 (remarks of Rep. MacGregor); *id.* at 16,285 (remarks of Rep. Machen); *id.* at 16,295 (remarks of Rep. Reid).

permit suppression of a confession given by a suspect in state custody unless he demonstrated that federal and state authorities had a "working arrangement" for the purpose of depriving him of his right to a prompt presentment under Rule 5(a). And that burden had to be met with "facts, * * * not mere suspicion or conjecture," showing that "federal law enforcement officers induce[d] state officers to hold the defendant illegally so that they [could] secure a confession." *United States* v. *Coppola*, 281 F.2d at 344. Respondent has not met and cannot meet that test, and his suppression motion could not have succeeded even if Congress had never enacted Section 3501.

The second proposition is that Congress enacted Section 3501 in order to make voluntariness the sole test for the admissibility of confessions, and that Congress did so because it believed that the *McNabb-Mallory* doctrine was unduly favorable to criminal defendants. Yet the interpretation of Section 3501 adopted by the court of appeals—that state and federal custody must always be aggregated for purposes of pre-presentment delay, Pet. App. 20a n.8—is far more generous to criminal defendants than the *McNabb-Mallory* doctrine ever was, and can scarcely be thought more limited than the rule followed by this Court in *Anderson* and *Coppola*.

Not surprisingly, the five courts of appeals that have considered this issue since Section 3501 was enacted have disagreed with the Ninth Circuit's view that state and federal custody must always be aggregated in calculating pre-presentment delay. Those courts have concluded that Section 3501(c) either is not triggered at all by a state arrest, or is triggered by such an arrest only when the defendant demonstrates that federal and state authorities colluded with the specific purpose of depriving him of a speedy federal presentment. See *United States* v. *Carter*, 910 F.2d 1524, 1528 (7th Cir. 1990), cert. denied, 111 S. Ct. 1628 (1991); *United States* v. *Barlow*, 693 F.2d 954, 957-959 (6th Cir. 1982), cert. denied, 461 U.S. 945 (1983); *United States* v. *Van Lufkins*, 676 F.2d 1189, 1192-1193 (8th Cir. 1982); *United States* v. *Torres*, 663 F.2d 1019, 1023-1024 (10th Cir. 1981), cert. denied, 456 U.S. 973 (1982); *United States* v. *Rollerson*, 491 F.2d 1209, 1212 (5th Cir. 1974).[11]

The Ninth Circuit's ruling that a state arrest constitutes an "arrest" for purposes of Section 3501 is thus contrary to the language and context of the statute, its background and legislative history, and the uniform line of decisions from other courts of appeals. The court of appeals was therefore wrong to conclude that the period of pre-presentment delay while respondent was in state custody could be used to justify suppression of his confession.

II. EVEN IF THE RELEVANT ARREST WAS EFFECTED BY CALIFORNIA AUTHORITIES, ADMISSION OF RESPONDENT'S VOLUNTARY CONFESSION WAS PROPER

Rejection of the court of appeals' conclusion that the arrest by California authorities was the relevant

[11] See also *United States* v. *White*, 979 F.2d 539, 543 (7th Cir. 1992); *United States* v. *Watson*, 591 F.2d 1058, 1061-1062 (5th Cir.) (per curiam), cert. denied, 441 U.S. 965 (1979); *United States* v. *Jensen*, 561 F.2d 1297, 1299 (8th Cir. 1977); *United States* v. *Gaines*, 555 F.2d 618, 622 (7th Cir. 1977); *United States* v. *Elliott*, 435 F.2d 1013, 1015 (8th Cir. 1970).

"arrest" for purposes of Section 3501 and Rule 5 is sufficient to overturn its judgment. But even if this Court concludes that the court of appeals correctly decided that issue, reversal is nonetheless required for two independent reasons.

A. First, the court of appeals erroneously concluded that Section 3501(c) authorizes the suppression of voluntary confessions in order to penalize the government for a pre-presentment delay that exceeds six hours. Section 3501(c) does not prescribe what consequences must follow when a confession is made outside the six-hour "safe harbor" period. It provides only that certain confessions shall be admitted notwithstanding delay; it does not state that all other confessions must be suppressed. See *United States* v. *Halbert*, 436 F.2d 1226, 1232 (9th Cir. 1970); see also *United States* v. *Marrero*, 450 F.2d 373, 378 (2d Cir. 1971), cert. denied, 405 U.S. 933 (1972). Any implication to the contrary is refuted by Section 3501(a), which requires the admission in evidence of any confession found by the trial judge to be voluntary.

The court of appeals, however, was of the view that to construe "§ 3501(a) literally * * * would create a clear conflict with § 3501(c) and would render the latter section meaningless." Pet. App. 9a. The court did not believe that giving effect to Section 3501(a) would render Section 3501(c) "meaningless" in the sense that Section 3501(c) would have no effect in any case; in cases in which a confession is made within six hours of arrest, Section 3501(c) plainly precludes a district judge from declaring the confession inadmissible solely because of delay. Rather, the court believed that giving full effect to

Section 3501(a) would override what the court understood to be the negative pregnant of Section 3501(c)—that "there must be circumstances in which delay in arraignment will require suppression of a confession regardless of [its] voluntariness." Pet. App. 10a.

The court of appeals erred in concluding that what Congress did not say in Section 3501(c) was more important than what it did say in Section 3501(a). Congress made clear in Section 3501(a) that a voluntary confession "shall be admitted." Whatever negative implication might be drawn from Section 3501(c) standing alone, that implication cannot overcome what Congress expressly said in Section 3501(a). See *Springer* v. *Government of Philippine Islands*, 277 U.S. 189, 206 (1928) (negative implications drawn from statutory language and canons of construction must yield when "a contrary intention on the part of the law-maker is apparent"); see also *Pauley* v. *BethEnergy Mines, Inc.*, 111 S. Ct. 2524, 2537-2538 (1991); *Burns* v. *United States*, 111 S. Ct. 2182, 2186 (1991).

In any event, there is no conflict between the negative implication of Section 3501(c)—*i.e.*, that delay in presenting the defendant can sometimes affect the admissibility of his confession—and the language of Section 3501(a). The two subsections can be read consistently, together with Section 3501(b), to produce the following regime: confessions are to be admitted if they are voluntary (Section 3501(a)); voluntariness turns on a consideration of a variety of factors, including any period of delay after arrest and before presentment (Section 3501(b)); if the confession is given before present-

ment but within six hours of the arrest, the delay in presentment shall not be a basis for holding the confession inadmissible (Section 3501(c)); but if the confession occurs outside that six-hour period, the "safe harbor" of Section 3501(c) is unavailable, and the period of delay in presenting the arrestee may in some circumstances justify a finding of involuntariness, either alone (in cases where the delay is extraordinarily long and oppressive) or in conjunction with other factors set forth in Section 3501(b).

Assuming that respondent was "arrested" for purposes of Section 3501(c) on Friday afternoon, and that the "safe harbor" provision of Section 3501(c) was therefore unavailable to the government (because he confessed on Monday, more than six hours after the Friday "arrest"), the district court nonetheless correctly refused to suppress his confession. The unavailability of the "safe harbor" means that the delay in presentment could be considered in determining the voluntariness of respondent's confession, and that it could potentially be the principal basis for a finding of involuntariness. In this case, however, there is no basis for concluding that the delay between respondent's state arrest and his interrogation by federal officers rendered his confession involuntary.

As the district court noted (Pet. App. 44a-45a), respondent was advised in his native language of his rights to terminate the interview at any time or to have the assistance of counsel during the interrogation, and he readily agreed to waive those rights both orally and in writing. Respondent had experience with law enforcement, since he had been a police officer in Mexico. His conversation with the agents

appeared relaxed, he was fully aware that the agents were interested in investigating the allegations regarding respondent's possession of counterfeit currency, and he felt free to terminate the interview when it took a turn he did not like. Accordingly, the factors set forth in Section 3501(b) were entirely consistent with the district court's conclusion that respondent's "statements during interrogation were, in fact, voluntarily, intelligently and knowingly made." *Id.* at 45.

B. Even if Section 3501 retained the broadest possible version of the *McNabb-Mallory* doctrine for confessions falling outside the six-hour "safe harbor" period of Section 3501(c),[12] the decision of the court of appeals would still be unsupportable.

1. As we have noted, the Ninth Circuit expressly rested its decision to suppress on the purported misconduct of federal agents in delaying respondent's presentment from Monday afternoon to Tuesday morning. Nothing in the record supports the court of appeals' conclusion that the delay in presenting respondent to the magistrate was the result of mis-

[12] In fact, because respondent was advised of his rights as required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and voluntarily waived those rights, he should be barred from any claim under *McNabb-Mallory*. As several circuits have concluded, see, *e.g.*, *United States* v. *Salamanca*, 990 F.2d 629, 633-634 (D.C. Cir. 1993); *United States* v. *Barlow*, 693 F.2d at 959; *United States* v. *Indian Boy X*, 565 F.2d 585, 591 (9th Cir. 1977), cert. denied, 439 U.S. 841 (1978); *Pettyjohn* v. *United States*, 419 F.2d 651, 655-656 (D.C. Cir. 1969), cert. denied, 397 U.S. 1058 (1970); *O'Neal* v. *United States*, 411 F.2d 131, 136-137 (5th Cir.), cert. denied, 396 U.S. 827 (1969), *Miranda* warnings supply the words of "caution" that the Court found lacking in *Mallory*. See *Mallory* v. *United States*, 354 U.S. at 455.

conduct. On the contrary, the record is clear that the delay was caused by the booking process and the congestion in the magistrate's docket. Pet. App. 49a. *Mallory* itself recognized that the time necessary to complete the administrative steps incident to arrest, including booking, is not "unnecessary delay," and it emphasized that the government had failed to present the defendant before one of the "numerous committing magistrates" who were available. 354 U.S. at 454-455. Even under *Mallory*, therefore, the delay on which the court of appeals relied was not "unnecessary," and it would not furnish a basis for suppressing a confession that followed that delay.

2. More importantly, respondent confessed on Monday morning, and he was not interrogated and made no statement of any kind from Monday afternoon to Tuesday morning. The delay in presenting him following his federal arrest therefore could not possibly have had any role in inducing his confession.

In *United States* v. *Mitchell*, *supra*, this Court held that post-confession delay, even if improper, does not affect the admissibility of a confession under the *McNabb* rule. In *Mitchell*, the defendant confessed shortly after his arrest, but his arraignment was then illegally delayed for eight days. This Court reversed an order suppressing the confession, explaining:

> [T]he illegality of Mitchell's detention does not retroactively change the circumstances under which he made the disclosures. These, as we have seen, were not elicited through illegality. Their admission, therefore, would not be use by the Government of the fruits of wrongdoing by its officers. Being relevant, they could be excluded only as a punitive measure against unrelated wrongdoing by the police. Our duty in shaping rules of evidence relates to the propriety of admitting evidence. This power is not to be used as an indirect mode of disciplining misconduct.

322 U.S. at 70-71.

That principle reflects a recognition that post-confession delay has no logical relevance to the voluntariness of a defendant's confession, and that even *McNabb*'s prophylactic rule should not be invoked to deprive the prosecution of a confession whose voluntariness is not even theoretically affected by delay. That understanding has appropriately informed the construction given by other circuits (and by the Ninth Circuit in earlier cases) to the term "delay" in Section 3501.[13] Accordingly, even if the delay between Monday afternoon and Tuesday morning in presenting respondent to a magistrate could be deemed the product of unreasonable conduct by the arresting agents, that period of post-confession delay could not have played any role in producing respondent's confession. It therefore would not have been counted even under the *McNabb-Mallory* doctrine that predated the enactment of Section 3501.

Thus, even on the theory that some form of the *McNabb-Mallory* doctrine remains the law, the court

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[13] See, *e.g.*, *United States* v. *Rojas-Martinez*, 968 F.2d 415, 418 (5th Cir.), certs. denied, 113 S. Ct. 828 (1992), and 113 S. Ct. 995 (1993); *United States* v. *Cruz Jimenez*, 894 F.2d 1, 8 (1st Cir. 1990); *United States* v. *Montes-Zarate*, 552 F.2d 1330, 1331 (9th Cir. 1977) (per curiam), cert. denied, 435 U.S. 947 (1978); *United States* v. *McCormick*, 468 F.2d 68, 75 (10th Cir. 1972), cert. denied, 410 U.S. 927 (1973); *United States* v. *Keeble*, 459 F.2d 757, 761 (8th Cir. 1972), rev'd on other grounds, 412 U.S. 205 (1973).

of appeals' approach to the admissibility of respondent's confession was based on a seriously flawed interpretation of Section 3501 and the federal law of confessions. Because respondent's voluntary confession was not the product of misconduct by the arresting officers or an unreasonable delay in presenting him to a federal magistrate, the confession was properly admitted at trial, and respondent's conviction should have been upheld.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1993

UNITED STATES OF AMERICA,

Petitioner,

v.

PEDRO ALVAREZ-SANCHEZ,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

I. WHETHER A CONFESSION IS SUBJECT TO SUPPRESSION UNDER 18 U.S.C. § 3501(c) WHEN THE CONFESSION IS GIVEN AFTER THE DEFENDANT HAS BEEN HELD IN CUSTODY BY STATE OFFICERS FOR OVER 2½ DAYS WITHOUT ARRAIGNMENT.

A. *Whether A Confession Is Subject To Suppression Under Section 3501(c) Based On Delay In Arraignment Alone When That Delay Exceeds Six Hours And Is Not Otherwise Reasonable.*

B. *Whether An Arrest By State Officers Qualifies As An "Arrest Or Other Detention In The Custody Of Any Law-Enforcement Officer Or Law-Enforcement Agency" Within The Meaning Of Section 3501(c).*

C. *Whether The Court Of Appeals Correctly Ruled That The Confession In The Present Case Should Be Suppressed.*

II. WHETHER THE COURT OF APPEALS' RULING IN THE PRESENT CASE SHOULD BE AFFIRMED ON THE ALTERNATIVE GROUND THAT MR. ALVAREZ'S STATEMENT WAS MADE DURING A VIOLATION OF HIS FOURTH AMENDMENT RIGHT TO A PROMPT PROBABLE CAUSE DETERMINATION.

A. *Whether the Exclusionary Rule Applies to Statements Made During Violation of The Right To A Prompt Probable Cause Determination.*

B. *Whether The Court Should Consider This Alternative Ground For Affirmance When The Issue Was Not Raised Below But There Was An Intervening Change In The Law.*

QUESTIONS PRESENTED – Continued

C. *Whether The Good Faith Exception To The Exclusionary Rule Applies Because The Officers Relied On A California Statute.*

1. Whether the officers complied with the requirements of the California statute.

2. Whether the good faith exception applies to reliance on permissive, as opposed to mandatory, statutes.

3. Whether the good faith exception applies when a reasonable officer would know there was a substantial risk his conduct violated a suspect's constitutional rights.

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CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution provides: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, ..."

STATEMENT OF THE CASE

Mr. Alvarez was arrested late on a Friday afternoon and not arraigned until the following Tuesday. Pet. App. 52a-53a, 57a. Despite the fact that counterfeit currency was found at the time of the arrest, *id.* at 54a, 57a, the Secret Service interrogation which elicited the statements at issue did not take place until approximately 11:30 a.m. on the Monday following the arrest, *id.* at 51a. At the time of the interrogation, therefore, Mr. Alvarez had been in custody for over 2½ days without an arraignment or any judicial determination of probable cause.

The detective in charge of the investigation claimed that he believed state law permitted a delay in arraignment until Tuesday, Pet. App. 57a, but Mr. Alvarez was never arraigned on state charges. Though another officer recalled being informed that prosecution would be declined by the district attorney, *id.* at 54a, the detective in charge indicated that the case was never presented to the district attorney and would have been presented only if the Secret Service decided not to prosecute Mr. Alvarez federally, *id.* at 59a. In any event, Mr. Alvarez was surrendered to Secret Service custody for arraignment on federal charges when the Secret Service indicated it wished to pursue such charges. *Id.* at 52a. The Secret Service was contacted pursuant to a Los Angeles County Sheriff's Department policy that the Secret Service be informed anytime counterfeit money is found. *Id.* at 57a.

The court of appeals held that 18 U.S.C. § 3501(c) required suppression of Mr. Alvarez's statement. The

court held that Section 3501(c) must be construed to permit suppression of a confession solely on the basis of pre-arraignment delay if the delay exceeded six hours and was not otherwise reasonable. Pet. App. 9a-10a. The court reasoned that a contrary interpretation of Section 3501(c) would violate the rule that a statute should be construed so as to give effect to each of its provisions. *Id.* The court also ruled, based on longstanding Ninth Circuit precedent, that the delay which must be taken into account under Section 3501(c) was the total period in both state and federal custody. *Id.* at 20a-21a & n. 8.

The court then applied the statute. While noting that there had been a delay in arraignment "from Monday afternoon to Tuesday morning" as a result of the interrogation, the court described the delay that mandated suppression as the delay "specifically to provide federal officers with time to interrogate [Mr. Alvarez]," not a delay which took place after the interrogation. Pet. App. 21a. The court concluded that this "avoidable and deliberate delay . . . , after a long period of custody, for the sole purpose of interrogating the arrestee" justified suppression of Mr. Alvarez's statement. *Id.* at 22a.

SUMMARY OF ARGUMENT

The fundamental issue in this case is whether the government may place into evidence a confession obtained from a person arrested without a warrant and held in jail for 2½ days without being taken before a magistrate. Where, as here, there are no unusual circumstances which justify the delay, both 18 U.S.C. § 3501(c) and the Constitution require that such a confession be suppressed.

I. Section 3501(c) must be construed so that statements are subject to suppression solely on the basis of

delay when the delay exceeds six hours and is not otherwise reasonable. The plain language of Section 3501(c) describes the six-hour period as a "time limitation" and refers to the effect of delay on "[ ]admissib[ility]," not "voluntariness".

This plain language must be applied in addition to the general provisions of Section 3501(a) and Section 3501(b) regarding voluntariness. Both the rule that statutes should be construed so as not to render any part superfluous and the rule that specific provisions control over general provisions support such a construction. The original *McNabb-Mallory* rule applied to even voluntary confessions, and the legislative history of Section 3501(c) demonstrates that a compromise was reached during debate, whereby a limited form of the rule was retained for delays beyond six hours which were not otherwise reasonable.

The time limitation of Section 3501(c) begins to run from the time of arrest by state officers, moreover. Neither the statutory language, purpose, nor history suggests that Section 3501(c) applies to arrests by state officers only when they have a "working arrangement" with federal officers. The statute refers to arrest by "any" law enforcement officer or agency – without qualification. The purpose of Section 3501(c) is to limit incommunicado detention, and so all pre-arraignment custody should be included, especially when the only arraignment is in federal court.

While the legislative history is largely silent on this issue, the few comments which do exist suggest that Congress assumed state custody would be included. The *McNabb-Mallory* case law which existed at the time Section 3501(c) was enacted did not clearly establish a "working arrangement" requirement in cases where there was no state arraignment or sentence. Nothing suggests

that there was some unexpressed intent to limit the unqualified reference to "any" law enforcement officer or agency.

The court of appeals correctly suppressed Mr. Alvarez's confession under Section 3501(c). It did not base its decision on delay which took place after the confession but based its decision on (1) the fact that there was a delay specifically for interrogation and (2) the fact that this delay was in addition to an already lengthy delay. In any event, suppression under Section 3501(c) is mandatory; such was the original *McNabb-Mallory* rule, and Congress evidenced no intent to modify the rule beyond placing the six-hour time limitation on it.

II. Even if Section 3501(c) does not require suppression, the Court should affirm the decision below, because Mr. Alvarez's statement was made during a violation of his right to a prompt probable cause determination. The right to a prompt probable cause determination is a fourth amendment right to which the exclusionary rule must apply. If the exclusionary rule is not applied, officers will be tempted to delay and interrogate defendants before presentation of the case to a magistrate to avoid (1) the possibility of an adverse probable cause ruling and (2) "interference" arising from the appointment of counsel, setting of bail, and other procedural protections which many, if not most, jurisdictions provide in connection with a probable cause hearing. The exclusionary rule will deter misconduct by depriving officers of the fruits of the delay.

While the fourth amendment argument was not raised below, the Court should consider it, because there was a significant intervening change in the law. *County of Riverside v. McLaughlin*, 111 S. Ct. 1661 (1991) created a presumption that delays in excess of 48 hours are unreasonable; this made litigation of the fourth amendment

issue feasible in a criminal case. Mr. Alvarez has consistently complained of the delay in some form, moreover; he simply based his initial challenge on Section 3501(c) rather than the fourth amendment.

While the state officers who arrested and held Mr. Alvarez claimed to have relied on a California statute, the good faith exception does not preclude application of the exclusionary rule. First, the officers did not comply with the requirements of the statute. Second, the good faith exception should not be extended to reliance on a permissive statute. Third, the officer's reliance here was not reasonable. A reasonable officer would have known there was a substantial risk that the statute was invalid, and the good faith exception should not apply in such circumstances.

ARGUMENT

I. MR. ALVAREZ'S CONFESSION WAS SUBJECT TO SUPPRESSION UNDER 18 U.S.C. § 3501(c).

A. Confessions Are Subject To Suppression Under Section 3501(c) Based On Delay In Arraignment Alone When The Delay Exceeds Six Hours And Is Not Otherwise Reasonable.

The court of appeals was correct in its conclusion that statements are subject to suppression under Section 3501(c) solely on the basis of delay when the delay exceeds six hours and is not otherwise reasonable. Both the language of the statute and its legislative history support this conclusion.

1. The statutory language.

The plain language of Section 3501(c) indicates that Congress intended that provision to be a limit on the time during which law enforcement officers may interrogate a

suspect. Congress described the six-hour time period not as a "safe harbor" but as a "time limitation". 18 U.S.C. § 3501(c). "Limitation" is defined as "a restriction or restraint imposed from without", or "a time assigned for something." *Webster's Third New International Dictionary* 1312 (1986).

In addition, Section 3501(c) by its plain language determines when confessions will be "*inadmissible* solely because of delay" (emphasis added), not when delay will enter into the determination of voluntariness. This contrasts with the language of Section 3501(b), which governs the consideration of delay and other factors in "determining the issue of voluntariness". This focus on the effect of delay on *admissibility* instead of the consideration of delay "in determining the issue of voluntariness" is further evidence that Section 3501(c) was intended to establish a bright-line rule limiting interrogation.

The Government ignores this plain language and focuses solely on one sentence in Section 3501(a), providing that voluntary confessions "shall" be admissible. The Government then suggests that Section 3501(c) be interpreted as merely providing further guidance in the determination of voluntariness. This ignores the fact that Congress expressly provided much more detailed guidance in Section 3501(b). It is that section, which directly follows Section 3501(a), that explains how voluntariness should be determined.

Section 3501(c) has an altogether different function. Its focus is time. By its plain terms, it creates a "time limitation" on delay in arraignment, which affects whether confessions are "inadmissible". In contrast to Sections 3501(a) and 3501(b), which create a case-specific balancing test for voluntariness, Section 3501(c) creates a bright-line rule which limits pre-arraignment delay.

In recognition of this, most commentators interpret Section 3501(c) as requiring exclusion if delay exceeds six hours and is not otherwise reasonable. *See* 3 J. Wigmore, *Evidence* § 862a, at 623 (Chadbourn rev. 1970); 8 J. Moore, *Moore's Federal Practice* ¶ 5.02[2], at 5-13-15 (2d ed. 1992); *see also United States v. Perez*, 733 F.2d 1026, 1035 (2d Cir. 1984); *United States v. Robinson*, 439 F.2d 553, 563-64 (D.C. Cir. 1970). Indeed, to construe Section 3501(c) otherwise would violate fundamental principles of statutory construction.

Initially, a contrary construction would violate the rule that statutes should be construed so as to give every word effect, *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992), and not to render any part inoperative or superfluous, *Mountain States Tel. & Tel. Co. v. Santa Ana*, 472 U.S. 237, 250 (1985); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). Broken down into its component parts, Section 3501(c) provides that a confession shall not be inadmissible solely because of delay if two conditions are satisfied: (1) The confession is voluntary; and (2) the confession was made within six hours of arrest (or such greater time as the court finds reasonable). If Section 3501(a) is construed to override Section 3501(c), the only requirement for admission of *any* confession is the requirement of voluntariness. The second condition set forth in Section 3501(c) – that the confession be made within the specified time period – is then rendered meaningless. To avoid this result, the plain language of Section 3501(c) must be read to establish an exception to Section 3501(a) when there is a delay in arraignment which exceeds six hours and is not otherwise reasonable.[1]

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[1] The government's suggested reconciliation of Section 3501(a) and Section 3501(c), *see* Brief for the United States, at 33-34, unacceptably rewrites Section 3501(c). As the third step in

Such a construction is also mandated by the rule of statutory construction that a specific statute should control over a general one, *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974), *quoted in Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976). The rationale for this rule is that it is in considering the specific statute that "the mind of the legislator has been turned to the details of the subject, and he has acted upon it." *Id.* (*quoting* T. Sedgwick, *The Interpretation and Construction of Statutory and Constitutional Law* 98 (2d ed. 1874)). This rationale is particularly pertinent in the case at bar, for the legislative history, *see*

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its "regime", the government suggests that Section 3501(c) be construed to mean that "if the confession is given before presentment but within six hours of the arrest, the delay in presentment shall not be a basis for holding the confession inadmissible." *Id.* Since it is also the position of the government that confessions are inadmissible only if they are involuntary, this third step in the "regime" must mean that delay alone cannot be the basis for a finding of involuntariness if the delay is less than six hours.

Put in a logical construct, the government urges that Section 3501(c) be read as: *If* there is delay of six hours or less, *then* there are limits on the ways of finding voluntariness, to wit, such a finding cannot be based on delay alone. This reverses the plain language of Section 3501(c), which states that a confession given within six hours of arrest "shall not be inadmissible solely because of delay . . . if such confession is found by the trial judge to have been made voluntarily. . . . " Put in a logical construct, this means: *If* the confession is voluntary, *then* there is a limit on the consideration of delay, to wit, a confession may not be ruled inadmissible solely on the basis of delay which does not exceed six hours. The limit on consideration of delay comes into play *after* the determination of voluntariness, not before.

The government's "regime" rewrites the statute by making the voluntariness inquiry conditional on delay instead of the delay inquiry conditional on voluntariness. In essence the government is rewriting a statute to say "If B, then A" when it really says "If A, then B."

infra pp. 10-13, demonstrates that it was in debating Section 3501(c), not Section 3501(a), that "the mind of [the Senate] . . . turned to" the question of delay in arraignment.[2]

2. The legislative history.

The legislative history is even more compelling. The development of Section 3501(c) as it progressed through Congress demonstrates it was intended to be precisely what its plain language suggests – a "time limitation" directly affecting the "admissibility" of confessions, not just one more consideration "in determining the issue of voluntariness".

In the bill as initially reported out of the Senate Judiciary Committee, Section 3501(c) included no time limitation. The committee report which accompanied the bill evidenced a clear intent to flatly and completely repudiate the *McNabb-Mallory* rule. *See generally* S. Rep. No. 1097, 90th Cong., 2d Sess. 38-41 (1968) (hereinafter "Senate Report"). As the committee report recognized, the *McNabb-Mallory* rule made even voluntary confessions inadmissible if there was an unnecessary delay in arraignment. *See* Senate Report, *supra*, at 38.

The bill as reported was not agreeable to all, however. The title which contained Section 3501 "was

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[2] The explanation of Section 3501(a) offered by the Judiciary Committee spokesman, Senator McClellan, when that section was considered separately with Section 3501(b) during a "division" of the bill, is enlightening. Senator McClellan stated that "this division has to do with the *Miranda* decision." 114 Cong. Rec. 14,171 (1968) (remarks of Sen. McClellan). Senator McClellan then apparently concurred with Senator Tydings' description of the second "division" – Section 3501(c) – as addressing "the *Mallory* decision". *Id.* at 14,172 (remarks of Sen. Tydings).

retained in the bill by the narrowest possible margin in the committee – an evenly divided vote of the full committee." *See* Senate Report, *supra* p. 9, at 147 (minority views of Messrs. Tydings *et al.*). Opponents on the Judiciary Committee "strongly opposed the committee action" and "urge[d] our colleagues in the Senate to delete title II from the bill when it is offered on the floor of the Senate." *Id.*

During debate, more specific concerns were expressed. Opponents complained that Section 3501(c) would "permit Federal criminal suspects to be questioned *indefinitely*," 114 Cong. Rec. 11,740 (1968) (remarks of Sen. Tydings) (emphasis added), and placed *"[n]o* limitations . . . upon the length of time which may be permitted to elapse between arrest and arraignment," *id.* at 14,135 (remarks of Sen. Brooke) (emphasis added).[3] The proponents countered with claims that the *Mallory* decision required almost immediate arraignment and was grossly inflexible.

> Since [*Mallory*], they have held that a person cannot be given even 5 minutes, that that is an unreasonable time. . . . If you have to run him straight to a magistrate, it is not even fair to the person arrested. With a little investigation, you might be able to find out that he is not guilty, and you can turn him loose.

114 Cong. Rec. 14,172-73 (remarks of Sen. McClellan).[4]

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[3] *See also id.* at 14,174 (remarks of Sen. Cooper); *id.* at 14,137 (remarks of Sen. Fong); *id.* at 13,990 (remarks of Sen. Tydings); *id.* at 13,848 (remarks of Sen. McClellan); *id.* at 11,894 (remarks of Sen. Tydings); *id.* at 11,745 (remarks of Sen. Brooke).

[4] *See also* Senate Report, *supra* p. 9, at 38; 114 Cong. Rec. 14,132 (remarks of Sen. Bible) (*citing Alston v. United States*, 348 F.2d 72 (D.C. Cir. 1965) and describing it as case where "conviction of a self-confessed murderer whose guilt was not in dispute" was reversed "based on a 5-minute delay"); *id.* at 14,017 (remarks of Sen. Stennis) (describing *Mallory* as "inflexible rule" and noting "[t]he length of delay which invalidates a voluntary confession has been steadily reduced by the courts from 5 hours to 5 minutes"); *id.* at 11,612 (remarks of Sen. Thurmond); *id.* at 11,201-02 (remarks of Sen. McClellan).

Section 3501(c) as reported to the floor of the Senate was thus highly controversial. Yet, some senators recognized a middle ground, reflected in a District of Columbia statute which had been passed the previous year. Senator McIntyre noted:

> [I]n a number of cases in the District of Columbia the "unnecessary delay" criterion of the *Mallory* rule had been interpreted and applied to such an extent as to make it virtually impossible for investigating officers to speak with arrested persons with any assurance that resultant confessions would be acceptable in the courtroom. . . . In order to provide procedures which would at once permit reasonable police interrogation of suspects while fully protecting their constitutional rights, a 3-hour aggregate time period was recommended by the committee and eventually accepted by the Congress as the limit for questioning an arrested person during an investigation following arrest and prior to appearance of the accused before a magistrate. Thus law-enforcement officers and judges were provided a workable rule of thumb by which oppressive practices could be avoided, both as a matter of policy and within proper constitutional limits.

114 Cong. Rec. 14,168 (remarks of Sen. McIntyre).

Senator Scott thereafter offered an amendment to Section 3501(c) which added the six-hour time limit presently in the statute. *See* 114 Cong. Rec. 14,184-85 (1968). Both Senator Scott and the Judiciary Committee spokesman, Senator McClellan, acknowledged that the amendment would place limits on the period during which interrogation could take place. Senator Scott stated: "My amendment provides that the period during which confessions may be received or interrogations may continue, which may or may not result in a confession, shall in no case exceed 6 hours." *Id.* at 14,184.[5] Senator McClellan stated: "I do not want an unreasonable time, but I do want an opportunity for the law enforcement officers to perform their duty." *Id.* at 14,185. Neither Senator Scott nor Senator McClellan suggested that interrogation could continue beyond six hours so long as any confession which was obtained was voluntary. Their comments – taken alone, and read in the context of the concerns previously expressed by other Senators – indicate that the time limit was in addition to, and independent of, the general requirement of voluntariness.[6]

The government is thus incorrect in its assertion that "there is no indication that any Senator believed that [Senator Scott's amendment] would affect the voluntariness test set forth in Section 3501(a)," Brief for the United

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[5] Senator Scott's initial amendment did not provide that a court could find a period greater than six hours to be reasonable. This qualification was proposed and approved at a later time. *See* 114 Cong. Rec. 14,787.

[6] When Senator Scott offered the amendment, Senator McClellan recognized the separate nature of the voluntariness inquiry. He pointed out: "If the judge finds [a confession] was not voluntary, no matter if [the suspect] was in custody for only 30 minutes, the confession should not be admitted." 114 Cong. Rec. 14,184 (remarks of Sen. McClellan).

States, at 28. Senator Scott and Senator McClellan spoke of the period during which interrogation was allowed and spoke of no allowance for additional interrogation so long as it produced confessions which were voluntary. Indeed, Senator Scott described his amendment as an attempt to conform Section 3501(c) to the District of Columbia law. *See* 114 Cong. Rec. 14,184 (remarks of Sen. Scott). That law – which was ordered printed in the record at the time Senator Scott's amendment was considered – made no reference whatsoever to voluntariness. *See* Act of Dec. 27, 1967, P. Law 90-226, § 301(b), 81 Stat. 734, 735-36 (1967) ("[a]ny statement, admission, or confession made by an arrested person within three hours immediately following his arrest shall not be excluded from evidence . . . solely because of delay in presentment"), *quoted in* 114 Cong. Rec. 14,185.

The ensuing debate in the House of Representatives does not suggest a different meaning. While it is true that some members of the House spoke generally of Section 3501(c) as overruling *Mallory*, *see* Brief for the United States, at 29 & n. 10, most recognized this was limited by Senator Scott's amendment. For example, Representative Anderson explained: "Section 3501(c) does overrule the *Mallory* decision. . . . *Specifically, a 6-hour delay before the suspect is brought before a committing magistrate would be permitted.*" 114 Cong. Rec. 16,276 (remarks of Rep. Anderson) (emphasis added).[7] Senator Scott's and Senator McClellan's remarks are entitled to the greatest weight,

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[7] *See also id.* at 16,273 (remarks of Rep. Rogers) (bill "modifies" *Mallory* rule; also noting six-hour time limit); *id.* at 16,068 (analysis of Rep. Celler) (describing Section 3501(c) as "obviously intended to repeal" *Mallory*, but also describing it as "expand[ing] the time limit to six hours during which interrogation may take place"); *id.* at 16,297-98 (remarks of Rep. Pollock); *id.* at 16,286 (remarks of Rep. Udall).

moreover, because of their more intimate involvement with the legislation as author and committee spokesman. *See Federal Energy Admin. v Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 203 (1976).[8] *See also Steiner v. Mitchell*, 350 U.S. 247, 254 (1956) (legislative history in body where provision originated more persuasive).

In sum, while some senators wanted to eliminate the *McNabb-Mallory* rule completely, they lost this legislative battle and had to compromise. Section 3501(c) retained a limited form of the rule which applied once six hours, or such longer period as a court might find reasonable, had passed. Nothing in the legislative history suggests that

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[8] This is especially true in the case of 18 U.S.C. § 3501. The bill of which it was a part was rushed through the House of Representatives in just two days, immediately after Senator Robert F. Kennedy had been assassinated. *See* 114 Cong. Rec. 16,293 (remarks of Rep. Fraser); *id.* at 16,288 (remarks of Rep. McClory); *id.* at 16,287 (remarks of Rep. Patten); *id.* (remarks of Rep. Dow); *id.* at 16,282 (remarks of Rep. Conte); *id.* at 16,281 (remarks of Rep. Blanton); *id.* at 16,076 (remarks of Rep. Harsha); *id.* at 16,073 (remarks of Rep. Mathias); *id.* (remarks of Rep. MacGregor); *id.* at 16,072 (remarks of Rep. Cahill); *id.* at 16,070 (remarks of Rep. Anderson). A number of congressmen complained that this prevented careful consideration of the bill. *See id.* at 16,298-99 (remarks of Rep. Colmer); *id.* at 16,294 (remarks of Rep. Ryan); *id.* at 16,288 (remarks of Rep. Schwengel); *id.* at 16,283 (remarks of Rep. Kastenmeier); *id.* at 16,076 (remarks of Rep. Derwinski). Indeed, some opined that most congressmen had not even fully read the bill. *See id.* at 16,299 (remarks of Rep. Colmer); *id.* at 16,066 (remarks of Rep. Celler). Representative Machen, one of the congressmen whose remarks are cited by the government, *see* Brief for the United States, at 29 n. 10, thought the bill still contained provisions restricting review of state court rulings, *see* 114 Cong. Rec. 16,285 (remarks of Rep. Machen), when those provisions had in fact been deleted by the Senate, *see id.* at 14,183-84; *id.* at 14,177.

the rule was also modified to require an additional finding of involuntariness, and, in fact, the comments of key senators indicate precisely the opposite.

B. The Arrest By State Officers Was An "Arrest Or Other Detention In The Custody Of Any Law-Enforcement Officer Or Law-Enforcement Agency" Within The Meaning Of Section 3501(c).

The government contends that Section 3501(c) applies to arrests by state officers only when they have a "working arrangement" with federal officers. This interpretation of Section 3501(c) is incorrect; it is not supported by either the statutory language, the statute's purpose, or its legislative history. The interpretation most consistent with the statutory language, purpose, and history is that Section 3501(c) applies to any arrest, whether by state or federal officers, especially when, as here, it is followed by a federal instead of a state arraignment.

1. The statutory language.

Initially, the plain language of the statute requires such a construction. In its effort to draw meaning from "the context" of Section 3501(c), the Government wholly fails to address the plain language of the statute. A careful reading of Section 3501(c) leads inescapably to the conclusion that it applies to individuals arrested by state authorities to the same extent as individuals arrested by federal authorities.

Section 3501(c) provides, in pertinent part:

> In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-

> enforcement officer or law-enforcement agency, shall not be inadmissible solely because of the delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia. . . .

First, the provision applies to persons "under arrest *or other detention*." (Emphasis added.) The use of the phrase "or other detention" evidences a congressional intent to take a broad view of the event triggering application of the statute.

Second, and even more importantly, the statute applies to persons "in the custody of *any* law enforcement officer or law enforcement agency." (Emphasis added.) "Any" is a broadly inclusive word meaning "one or some of whatever kind" and used "to indicate one that is not a particular or definite individual of the given category but whichever one chance may select." *Webster's Third New International Dictionary* 97 (1986). This Court has repeatedly recognized that use of the word "any" indicates a broad, inclusive intent. *See, e.g., United States v. James*, 478 U.S. 597, 605 (1986); *Pfizer, Inc. v. India*, 434 U.S. 308, 312 (1978); *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972).

This unqualified language contrasts with the prior reference in Section 3501(c) to criminal prosecution "by the United States or by the District of Columbia." It also contrasts with the later reference to judicial officers "empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia." The fact that Congress specifically qualified these other references, but did not qualify the reference to law enforcement officers, establishes an intent not to limit

the latter reference. *See Russello v. United States*, 464 U.S. 16, 23 (1983).[9]

Given the plain meaning of the word "any", there is no need to look to "context", as the government suggests, *see* Brief for the United States, at 14. Even was the Court to do so, however, context is helpful only to the extent that "all but one . . . meaning[ ] is . . . eliminated . . . ," *Deal v. United States*, 113 S. Ct. 1993, 1996 (1993), and here that is not the case.

In fact, the best "in context" reading of "arrest or other detention" is that it must include at a minimum any arrest which is followed by the filing of federal, rather than state, charges. Such a construction is essential if the statute is to function properly, for state officers can and often do make arrests for federal offenses. *See* 18 U.S.C. § 3041; Fed. R. Crim. Pro. 4(d)(1). *See also United States v. Bowdach*, 561 F.2d 1160, 1167-68 (5th Cir. 1977). Under the government's construction, Section 3501(c) would be

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[9] With one exception, *see United States v. Van Lufkins*, 676 F.2d 1189, 1192-93 (8th Cir. 1982), none of the court of appeals cases cited by the government, *see* Brief for the United States, at 31 & n.11, consider this statutory language. *See United States v. White*, 979 F.2d 539, 543 (7th Cir. 1992); *United States v. Carter*, 910 F.2d 1524, 1528 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1628 (1991); *United States v. Barlow*, 693 F.2d 954, 957-59 (6th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983); *United States v. Torres*, 663 F.2d 1019, 1023-24 (10th Cir. 1981), *cert. denied*, 456 U.S. 973 (1982); *United States v. Watson*, 591 F.2d 1058, 1061-62 (5th Cir.) (*per curiam*), *cert. denied*, 441 U.S. 965 (1979); *United States v. Jensen*, 561 F.2d 1297, 1299 (8th Cir. 1977); *United States v. Gaines*, 555 F.2d 618, 622 (7th Cir. 1977); *United States v. Rollerson*, 491 F.2d 1209, 1212 (5th Cir. 1974); *United States v. Elliott*, 435 F.2d 1013, 1015 (8th Cir. 1970). Given their failure to consider this most basic starting point for statutory construction, these cases should be given no weight.

totally inapplicable when a state officer arrests a defendant and exercises control over him until or almost until the defendant is actually presented to a federal magistrate. Where a state officer believes from the time of arrest that a federal crime has been committed and the defendant is arraigned only on federal charges, Section 3501(c) must apply.

Indeed, that is precisely the factual scenario presented here. This is not a case in which state officers were simply "enforcing their own laws", Brief for the United States, at 14, and the Court need not necessarily decide the applicability of Section 3501(c) in that situation. While the state officers may have had some concern for the enforcement of state law, they knew of the federal offense from the beginning and showed deference to federal interests. They notified the Secret Service about the counterfeit currency pursuant to an official policy, waited for an agent to come interview Mr. Alvarez, and then surrendered Mr. Alvarez to the Secret Service when it decided to pursue charges. The more narrow question presented by this case is whether Section 3501(c) applies to an arrest by state officers which is followed by a federal arraignment on federal charges, and no state arraignment.

Applying Section 3501(c) to state arrests followed by federal arraignment will further the purpose of the statute and not unduly constrain law enforcement. The purpose of Section 3501(c) is not, as the government appears to assume, *see* Brief for the United States, at 17, to deter federal officers from violating prompt arraignment rules. Congress in enacting Section 3501(c) chose to retain a limited form of the *McNabb-Mallory* rule. *See supra* pp. 12-15. That rule is a prophylactic rule designed to "check[ ] resort to those reprehensible practices known as the 'third degree' " and "aims to avoid all the evil implications of secret interrogation of persons accused of crime."

Mallory v. United States, 354 U.S. 449, 452-53 (1957) (*quoting McNabb v. United States*, 318 U.S. 332, 344 (1943)). It simply accomplishes this as a bright-line rule rather than through fact-specific inquiries into voluntariness. *Cf. Withrow v. Williams*, 113 S. Ct. 1745, 1753 (1993) (prophylactic *Miranda* safeguards intended to protect privilege against self-incrimination, not deter unlawful police conduct).

This purpose is most effectively advanced by a rule that focuses on the total time a defendant has been in custody without an arraignment.[10] Time in custody is time in custody, regardless of who the custodial official is.

If a defendant has already been in state custody for a lengthy period, federal officers simply have an incentive to present the defendant more promptly, without further delay for interrogation. The rule adopted by the court of appeals does not "effectively require[ ] federal authorities to make an arrest and to file charges before they can interview a suspect," Brief for the United States, at 17. Federal authorities are perfectly able to delay their interview of a suspect until either the *status quo* is restored by his release or he is arraigned in state court on state charges.

What the government is really complaining of is that it may be denied the opportunity to vicariously benefit from state custodial status without being held responsible for it. To exclude time in state custody from consideration under Section 3501(c) would create an opportunity for

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[10] Contrary to the suggestion of the government, *see* Brief for the United States, at 19 n. 3, Mr. Alvarez's position in the present case was not identical to that of the defendant in *United States v. Carignan*, 342 U.S. 36 (1951). In *Carignan*, the defendant had already been arraigned on another federal charge. *See id.* at 43-44. The purpose of preventing excessive incommunicado detention was therefore not implicated.

manipulation by federal officers, who could simply decline to take custody unless and until they had interrogated the suspect.[11]

2. The legislative history.

The legislative history of Section 3501(c) does not support the government's position, either. The government's lengthy discussion of legislative history includes not a single comment addressing the treatment of state custody preceding a federal arraignment. The government cites only the legislative history which it claims demonstrates an intent to completely overrule the *Mallory* decision. From this premise, the government concludes Congress must have intended to act unfavorably as to

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[11] The Speedy Trial Act cases cited by the government are inapposite. Initially, the language in the Speedy Trial Act differs – it expressly refers to an arrest or summons "in connection with [the] charges" contained in the indictment or information. 18 U.S.C. § 3161(b); *see United States v. Mills*, 964 F.2d 1186, 1188-89 (D.C. Cir.) (*en banc*), *cert. denied*, 113 S. Ct. 471 (1992). Secondly, the Speedy Trial Act is focused on a concern about charges "hanging over a person's head unresolved," *United States v. Janik*, 723 F.2d 537, 542 (7th Cir. 1983), and constitutional and policy concerns about dual prosecution, *see United States v. Iaquinta*, 674 F.2d 260, 264-68 (4th Cir. 1982) *and cases cited therein*, not the effect of excessive incommunicado detention. Finally, a narrower rule is justified because the sanction for a Speedy Trial Act violation – dismissal – is more severe than mere suppression of statements. *Cf. United States v. Crews*, 445 U.S. 463, 478 (1980) (White, J., concurring in result) (rejecting application of exclusionary rule where it "would be tantamount to holding that an illegal arrest effectively insulates one from conviction"). *See also United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2192-93 (1992); *Frisbie v. Collins*, 342 U.S. 519, 522 (1952); *Ker v. Illinois*, 119 U.S. 436, 444 (1886).

defendants in any and all respects. This argument must fail – for three reasons.

First, the government's premise is erroneous. As discussed *supra* pp. 11-15, Section 3501(c) as finally passed by Congress was not a complete repudiation of the *McNabb-Mallory* rule. Congress retained a limited form of the rule as a compromise.

Second, the government's logic is questionable as a principle of statutory construction. The Court should not construe a statute as "anti-defendant" in all respects based on a general conclusion that Congress was in an "anti-defendant" mood when it considered and passed the statute. No case adopts such an imperfect and undiscriminating principle of statutory construction.

Third, the *McNabb-Mallory* case law which predated Section 3501(c) did *not* clearly require a "working arrangement" between state and federal authorities in cases where a defendant was not initially arraigned on state charges. Neither *Anderson v. United States*, 318 U.S. 350 (1943) nor *United States v. Coppola*, 281 F.2d 340 (2d Cir. 1960) (*en banc*), *aff'd*, 365 U.S. 762 (1961) (*per curiam*) established this.

Initially, *Anderson* did not do so. While the Court in *Anderson* did note the existence of a "working arrangement" in that case, it did not hold that this was *required*. *See id*. at 356. The Court simply noted this as one fact in support of its holding.

Coppola is factually distinguishable. The defendant in *Coppola* was not only arrested by state officers, but was arraigned in state court, on state charges, which the state intended to pursue. *See Coppola*, 365 U.S. at 764 (Douglas, J., dissenting); *Coppola*, 281 F.2d at 342. The government in *Coppola* emphasized this as a critical factor. *See* Brief in Opposition, at 17, *Coppola v. United States*, No. 153 (O.T. 1960); Brief for the United States, at 35-36, 67, *Coppola v.*

United States, No. 153 (O.T. 1960). Many of the courts citing *Coppola* also emphasized this factor. *See Barnett v. United States*, 384 F.2d 848, 858 (5th Cir. 1967) (important "whether or not state officials will proceed with further action on the state charge independent of the federal investigation"); *Jones v. United States*, 342 F.2d 863, 865 n.2 (D.C. Cir. 1964) (*en banc*) (distinguishing *Coppola* on ground that there "the apprehension and detention were exclusively for state crimes"); *Burke v. United States*, 328 F.2d 399, 404 (1st Cir. 1964) (Aldrich, J., dissenting) (distinguishing *Coppola* as a case "where the defendant was held on bona fide state charges"); *Hollingsworth v. United States*, 321 F.2d 342, 350 (10th Cir. 1963) (noting local officers "were concerned *only with state offenses* and were not acting for or in behalf of federal officers, pursuant to any working arrangement *or otherwise*" (emphasis added)). In most of the cases which cited *Coppola* prior to enactment of Section 3501(c), there had been a state arraignment or sentence. *See, e.g., United States v. Hindmarsh*, 389 F.2d 137, 141, 146 (6th Cir. 1968); *United States v. Ardner*, 364 F.2d 719, 720 (4th Cir. 1966); *United States v. Thompson*, 356 F.2d 216, 219, 225 (2d Cir. 1965); *United States v. Gorman*, 355 F.2d 151, 156 (2d Cir. 1965); *Cram v. United States*, 316 F.2d 542, 543, 544-45 (10th Cir. 1963). That is not the situation presented here, where there was no state arraignment and the state officers clearly gave the federal charges priority.

Regardless of what the rule was under *McNabb-Mallory*, moreover, Section 3501(c) is the law now, and it refers without qualification to "arrest or other detention" by "any" law enforcement officer or agency. The *McNabb-Mallory* case law is relevant only to the extent that Congress focused on it in drafting and amending Section 3501(c). Nothing in the legislative history suggests either that Congress focused on the "working

arrangement" cases or that it decided on its own to adopt such a requirement. Indeed, those bits of legislative history which do exist suggest that Congress assumed that arrests by state officers would be generally included. *See* 114 Cong. Rec. 14,185 (1968) (remarks of Sen. Allott) (describing scenario where "in one of the outlying towns, . . . the *sheriff* picks up a man under the Dyer Act . . . on transporting a stolen vehicle across a State line illegally" (emphasis added)); *id.* at 14,184 (remarks of Sen. McClellan) ("I can appreciate that an officer might pick a suspect up at 12 o'clock at night, and need to check with officers in another *State*" (emphasis added)).

The development of Section 3501(c) in the legislative process is significant. The Senate Judiciary Committee initially reported a bill which would have overruled *McNabb-Mallory* wholesale. Other senators strenuously objected during the subsequent debate. Then a compromise was reached, whereby a limited form of the *McNabb-Mallory* rule was preserved.

Given the initial focus of the bill on overruling *McNabb-Mallory* wholesale, there would have been no need to draw a distinction between arrests by state officers and arrests by federal officers. Indeed, the broad references to "any" law enforcement officer or agency and "arrest or other detention" – which were both in the original version of Section 3501(c) – sweep quite broadly. While Congress could have narrowed this language once it added a *McNabb-Mallory* time limitation, it did not do so, and it thereby kept the original meaning.

At best for the government, the legislative history suggests that Congress did not consider a distinction between state and federal officers one way or the other. At worst, it suggests that Congress assumed an arrest by state officers was included.

C. The Court Of Appeals Correctly Ruled That Mr. Alvarez's Confession Should Be Suppressed.

There remains only to consider whether or not the court of appeals properly applied Section 3501(c) in the present case. The government, citing *United States v. Mitchell*, 322 U.S. 65 (1944), suggests the court of appeals did not apply the rule correctly because it based its ruling on delay which took place after Mr. Alvarez's confession. *See* Brief for the United States, at 36-38.

In advancing this argument, the government misreads the court of appeals' opinion. Mr. Alvarez did make his statement late Monday morning and the court of appeals did note that Mr. Alvarez's arraignment "was delayed from Monday afternoon to Tuesday morning". Pet. App. 21a. Yet, the court described the delay that violated Section 3501(c) as the one intended "specifically to provide federal officers with time to interrogate him". *Id.* It was thus the delay for the purpose of interrogation which the court found improper; its reference to the delay from Monday afternoon to Tuesday morning was simply a description of one effect of the delay for interrogation.

The government also misconstrues the court of appeals' opinion if it intends to suggest it was *only* the delay for interrogation that concerned the court of appeals. The court based its decision on the fact that the delay for interrogation was on top of the over 2½ day delay which had already taken place. *See* Pet. App. 22a ("the avoidable and deliberate delay engaged in here, *after a long period of custody*, for the sole purpose of interrogating the arrestee requires suppression of the confession" (emphasis added)). The additional delay for

interrogation was simply the straw that broke the camel's back.[12]

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[12] The government's passing suggestion that Mr. Alvarez's waiver of his *Miranda* rights bars any claim under Section 3501(c), *see* Brief for United States, at 35 n. 12, also lacks merit. The cases cited by the government stand only for the proposition that a brief delay to obtain a waiver of *Miranda* rights and conduct a subsequent interrogation is permissible. *See Pettyjohn v. United States*, 419 F.2d 651, 656 (D.C. Cir. 1969) (person who voluntarily makes statement cannot "then claim . . . that the . . . period during which they spoke constituted a prejudicial delay in violation of his right to rapid arraignment"), *cert. denied*, 397 U.S. 1058 (1970). *See also Frazier v. United States*, 419 F.2d 1161, 1166 n. 25 (D.C. Cir. 1969) (construing *Mallory* not to require exclusion of otherwise admissible confession solely because of brief delay in obtaining *Miranda* waiver). The cases which have followed *Pettyjohn* have generally involved delays which would have been found to be reasonable in any event. *See, e.g., United States v. Barlow*, 693 F.2d 954, 959 (6th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983); *United States v. Indian Boy X*, 565 F.2d 585, 587-89 (9th Cir. 1977), *cert. denied*, 439 U.S. 841 (1978); *O'Neal v. United States*, 411 F.2d 131, 136 (5th Cir.), *cert. denied*, 396 U.S. 827 (1969). The rule suggested by these cases does not apply to more extended delays. *See United States v. Keeble*, 459 F.2d 757 (8th Cir. 1972) (distinguishing *Frazier*, *O'Neal*, and *Pettyjohn* as involving "a short interval between the arrest and the statement" and holding *Miranda* warnings did not cure 99-hour delay in case at bar), *rev'd on other grounds*, 412 U.S. 205 (1973); *Frazier*, 419 F.2d at 1166 n. 25 ("[w]e do not conclude, however, that in waiving his right to remain silent, the accused also impliedly waives his right to complain of a *prior* violation of Rule 5(a)" (emphasis in original)).

Were such a limitation not recognized, the other purposes of Section 3501(c) would be undercut. A prompt arraignment

This ruling seems eminently reasonable when one examines the facts of the instant case. Counterfeit bills were found at the time of Mr. Alvarez's arrest. Local authorities were thus immediately aware that a federal prosecution was possible, and the detective in charge of the investigation indicated that he intended to present the case to the district attorney only if the Secret Service decided not to prosecute. Pet. App. 57a, 59a. When state officers give federal prosecutorial interests priority in this fashion, they should not take no action at all for 2½ days.

Regardless of how the court of appeals' opinion is read, moreover, Section 3501(c) required exclusion. While the court of appeals did not reach the issue and the government ignores it, exclusion is mandatory, not discretionary, when there is non-compliance with the time limitation in Section 3501(c).

This was the rule under the old *McNabb-Mallory* case law. *See Mallory v. United States*, 354 U.S. at 453 (describing rule as "render[ing] inadmissible incriminating statements"); *United States v. Carignan*, 342 U.S. 36, 41 (1951) (describing rule as requiring that confession "shall be excluded" if obtained during unlawful detention);

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assures not only that the defendant receives a prompt judicial advisement of his rights but also the appointment of counsel, an opportunity for the defendant to request bail, and a judicial review of the existence of probable cause, *see United States v. Salamanca*, 990 F.2d 629, 634 (D.C. Cir. 1993) ("[o]ne of the primary rationales for a prompt appearance before a magistrate is to resolve the issue of probable cause"). The right to request bail and the right to a judicial review of probable cause are not addressed at all in the *Miranda* warnings.

Upshaw v. United States, 335 U.S. 410, 414 (1948) (confessions "are inadmissible"). As noted *supra* p. 12, Section 3501(c) was amended to retain the *McNabb-Mallory* rule for delays in excess of six hours which were not otherwise reasonable. Senator Scott and Senator McClellan, in speaking of the amendment which added the limited *McNabb-Mallory* rule, spoke generally of how long interrogations could continue. *See* 114 Cong. Rec. 14,184 (1968) (remarks of Sen. Scott), *quoted supra* p. 12; *id.* at 14,185 (remarks of Sen. McClellan), *quoted supra* p. 12. Nowhere did any senator suggest that, in addition to limiting the rule to delays in excess of six hours, Congress also intended to modify the rule by making exclusion discretionary. The legislative history instead suggests that Congress intended to retain the *McNabb-Mallory* rule in its original form – with the one important caveat that it could not be applied at all to delays of six hours or less.

II. THE COURT OF APPEALS' RULING SHOULD BE AFFIRMED ON THE ALTERNATIVE GROUND THAT MR. ALVAREZ'S STATEMENT WAS MADE DURING A VIOLATION OF HIS FOURTH AMENDMENT RIGHT TO A PROMPT PROBABLE CAUSE DETERMINATION.

In *Gerstein v. Pugh*, 420 U.S. 103 (1975), this Court held that the fourth amendment requires a prompt judicial determination of probable cause when there is extended pretrial detention after a warrantless arrest. *See id.* at 126. In *County of Riverside v. McLaughlin*, 111 S. Ct. 1661 (1991), the Court held that a delay which exceeds 48 hours is presumptively unreasonable and is permissible only if there exists a "bona fide emergency or other extraordinary circumstance". *Id.* at 1670.

In the present case, there was a clear violation of this constitutional requirement by the time the Secret Service

agent interviewed Mr. Alvarez. Mr. Alvarez had been held in custody for over 2½ days, and there was no "bona fide emergency or other extraordinary circumstance". The local police detective who made the arrest indicated that there was no reason for the detention other than his belief that the law permitted him to take his time. *See* Pet. App. 57a. At the time Agent Lipscomb interviewed Mr. Alvarez, therefore, the detention was in violation of *Gerstein* and *McLaughlin*.

A. The Exclusionary Rule Applies To Statements Made During A Violation Of The Right To A Prompt Probable Cause Determination.

Because both *Gerstein* and *McLaughlin* were civil class actions, the Court did not address the question of when and how the exclusionary rule applies. The right to a prompt probable cause determination is a fourth amendment right, however. *Gerstein*, 420 U.S. at 114. And the general rule is that evidence obtained through a violation of the fourth amendment is subject to exclusion in order to discourage the unlawful conduct. *James v. Illinois*, 493 U.S. 307, 311 (1990); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

In deciding whether to recognize an exception to this general rule, the Court "has examined whether the rule's deterrent effect will be achieved, and has weighed the likelihood of such deterrence against the costs of withholding reliable information from the truth-seeking process." *Illinois v. Krull*, 480 U.S. 340, 347 (1987). While these costs are undesirable, they are an inevitable side effect of the protection of constitutional rights. *See Arizona v. Hicks*, 480 U.S. 321, 329 (1987) ("there is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all").

The exclusionary rule will have a significant deterrent effect on police disrespect for the basic fourth amendment right recognized in *Gerstein* and *McLaughlin*. If the exclusionary rule is not applied, the police will have no incentive to comply with *Gerstein* and *McLaughlin*, for they will risk no loss of evidence and no other sanction of note.[13] There will be an incentive to comply, on the other hand, if the rule is applied.

An argument might be made that the exclusion of a confession obtained during a *Gerstein-McLaughlin* violation is unnecessary to protect fourth amendment interests because: (1) The confession will be excludable as a fruit of the illegal arrest if there was no probable cause; and (2) a magistrate would have approved the detention in any event if there was probable cause. Relying upon this as a rationale for not applying the exclusionary rule would prove too much, however. An analogous claim that officers could have obtained a search warrant could be made in many, if not most, warrantless search cases. Yet, this argument against application of the exclusionary rule in the search warrant context has been expressly rejected. *See United States v. Chadwick*, 433 U.S. 1, 15-16 (1977), *overruled on other grounds, California v. Acevedo*, 111 S. Ct. 1982, 1991 (1991); *United States v. Ventresca*, 380 U.S. 102, 106 (1965) (*citing United States v. Johnson*, 333 U.S. 10 (1948) and *Chapman v. United States*, 365 U.S. 610 (1961)).[14]

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[13] Class action lawsuits such as those in *Gerstein* and *McLaughlin* can only be relied upon to remedy broad systemic violations, not individual violations which continue after systemic corrections have been made. Individual civil rights actions, while feasible in some isolated cases, are no more feasible than in cases where a defendant is arrested without probable cause.

[14] It also cannot necessarily be assumed that because a court subsequently finds probable cause for the arrest at a

The need to apply the exclusionary rule to enforce *Gerstein* and *McLaughlin* is highlighted by a comparison with this Court's application of the rule to illegal warrantless arrests in the home. The Court considered that problem in *New York v. Harris*, 495 U.S. 14 (1990). The Court noted that evidence found and statements taken in the home at the time of the unlawful entry would be subject to suppression but held that statements made outside the home would not be. *See id.* at 20-21.

The Court based its holding in *Harris* in part on a conclusion that once the defendant had been removed from the home, he was "in legal custody" and thus not entitled to release. *See id.* at 18, 20. A defendant who is held beyond the time allowed for a prompt judicial determination of probable cause, in contrast, *is* entitled to release. *See Gerstein*, 420 U.S. at 114 (judicial determination of probable cause a "prerequisite" to extended detention). *See also Cooley v. Stone*, 414 F.2d 1213 (D.C. Cir. 1969) (habeas corpus petitioner ordered released after being held for more than 16 days without probable cause hearing), *cited with approval in Gerstein*, 420 U.S. at 119. Such a defendant is not "in legal custody." Statements made during this period should be subject to suppression just as any statements made in the home during a warrantless arrest are subject to suppression under *Harris*.

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suppression hearing, a magistrate conducting a *Gerstein* review would also have found probable cause. As this Court has noted, "[r]easonable minds frequently may differ on the question whether a particular affidavit establishes probable cause." *United States v. Leon*, 468 U.S. 897, 914 (1984). *See also United States v. Ventresca*, 380 U.S. at 109. Great deference is given to a magistrate's finding, so long as there is a substantial basis for it. *See Illinois v. Gates*, 462 U.S. 213, 236 (1983).

An analysis of the incentives considered in *Harris* also supports this conclusion. The Court in *Harris* weighed the incentives as follows:

> Even though we decline to suppress statements made outside the home following a *Payton [v. New York*, 445 U.S. 573 (1980)] violation, the principal incentive to obey *Payton* still obtains: the police know that a warrantless entry will lead to the suppression of any evidence found, or statements taken, inside the home. If we did suppress statements like Harris', moreover, the incremental deterrent value would be minimal. Given that the police have probable cause to arrest a suspect in Harris' position, they need not violate *Payton* in order to interrogate the suspect. It is doubtful therefore that the desire to secure a statement from a criminal suspect would motivate the police to violate *Payton*.

Harris, 495 U.S. at 20-21.

In the *Gerstein-McLaughlin* context, the incentives are different. If statements and other evidence discovered during the violation itself are not suppressed, nothing will be. This will leave no incentive whatsoever to comply with *Gerstein* and *McLaughlin*.

Police officers will have an affirmative incentive not to comply, moreover. An officer who, before presenting the defendant to the magistrate, can obtain a confession which indisputably establishes probable cause will not have to worry about being ordered to release the defendant. Further, though *Gerstein* does not require it, many, if not most, jurisdictions combine the required judicial determination of probable cause with the appointment of counsel, a personal appearance before a judicial officer who advises the defendant of his rights, and/or a bail hearing. *See McLaughlin*, 111 S. Ct. at 1668, 1671; *Gerstein*, 420 U.S. at 119-25. A police officer in a jurisdiction such

as this will know that a defendant may be significantly less likely to waive his rights and submit to interrogation afterwards.

A comparison with *Murray v. United States*, 487 U.S. 533 (1988), also illustrates the need to apply the exclusionary rule to evidence obtained during a *Gerstein-McLaughlin* violation. In *Murray*, law enforcement officers had unlawfully entered a warehouse and seen marijuana but refrained from seizing it until they had obtained a search warrant. *See id.* at 535-36. The Court held that the "independent source" exception to the fruit of the poisonous tree doctrine would apply if the government could establish that the officers would have gotten a search warrant anyway. *See id.* at 542. As in *Harris*, the Court focused on the incentives for the typical law enforcement officer.

> An officer with probable cause sufficient to obtain a search warrant would be foolish to enter the premises first in an unlawful manner. By doing so, he would risk suppression of all evidence on the premises, both seen and unseen, since his action would add to the normal burden of convincing a magistrate that there is probable cause the much more onerous burden of convincing a trial court that no information gained from the illegal entry affected either the law enforcement officers' decision to seek a warrant or the magistrate's decision to grant it. . . . Nor would the officer *without* sufficient probable cause to obtain a search warrant have any added incentive to conduct an unlawful entry, since whatever he finds cannot be used to establish probable cause before a magistrate. (Footnote omitted.)

Id. at 540 (emphasis in original).

Again, the incentives differ in the present context. The other rights which most jurisdictions provide in conjunction with a judicial determination of probable cause may make it much more difficult for officers to obtain a confession. This gives officers a significant incentive to delay.

On the other hand, the Court's reasoning in *Murray* that an officer without sufficient probable cause will have no incentive to make an unlawful entry is inapplicable. This reasoning assumes an officer who will understand and comply with fourth amendment limitations. In the *Gerstein-McLaughlin* context, the officer has already made an arrest, and, if he made that arrest without probable cause, he has already made either a careless mistake or a knowing one about which he has no qualms. Such an officer is the most likely to seek a confession to strengthen his case and then hope that the lack of probable cause for the original arrest will not surface – because, for example, the defendant elects to plead guilty.

In the case of a defendant's statements, moreover, there is not the troublesome metaphysical question of the "reseizure of tangible evidence already seized". *See Murray*, 487 U.S. at 541-42. A second statement can always be sought through reinterrogation after a judicial determination of probable cause. *Cf. Oregon v. Elstad*, 470 U.S. 298, 309 (1985) (second statement obtained after valid waiver of *Miranda* rights not necessarily tainted by prior statement obtained without valid waiver). The first and second statements are clearly identifiable and separable.

Of course, application of the exclusionary rule is limited by the requirement that the causal connection between the illegality and the evidence in question not be overly attenuated. The standard to be applied when there is an arrest that is not initially supported by probable cause was enunciated in *Brown v. Illinois*, 422 U.S. 590

(1975). It focuses on three factors: The temporal proximity of the detention and the statement; the presence of intervening circumstances; and the purpose and flagrancy of the official misconduct. *Id.* at 603-04.

This standard is inapt in the context of a *Gerstein-McLaughlin* violation, however. In that context, the temporal proximity is immediate, because a *Gerstein* violation is a continuing violation of the defendant's rights; indeed, the passage of time actually aggravates the violation. *Accord* Thomas, *The Poisoned Fruit of Pretrial Detention*, 61 N.Y.U.L. Rev. 413, 458-59 (1986). The continuing nature of the violation also means that there can be no intervening circumstance, for there is no period between the violation and the statement during which a circumstance can intervene. *Id.* at 459; *compare Johnson v. Louisiana*, 406 U.S. 356, 365 (1972) (initial appearance before magistrate purged taint of illegal arrest); *Wong Sun v. United States*, 371 U.S. 471, 491 (1963) (release of defendant on own recognizance purged taint of illegal arrest). A waiver of *Miranda* rights is not a sufficient intervening circumstance; rather, it is "merely a 'threshold requirement' for Fourth Amendment analysis." *Dunaway v. New York*, 442 U.S. 200, 217 (1980) (*quoting Brown*, 422 U.S. at 604).

The more appropriate test to apply in the context of a *Gerstein-McLaughlin* violation is a bright-line test analogous to the one implicitly recognized in *New York v. Harris*, *supra*. As noted *supra* p. 30, the Court in *Harris* drew a simple distinction between statements obtained during the constitutional violation and those obtained after it had ended. By analogy, the exclusionary rule should apply in the *Gerstein-McLaughlin* context to all statements made during the excessive delay and should apply to no statements made afterward, regardless of

whether a defendant might show insufficient attenuation under *Brown*.[15]

In sum, application of the exclusionary rule to statements obtained during a *Gerstein-McLaughlin* violation is critical to enforcement of the fourth amendment right recognized in those cases. Without such an exclusionary rule, officers will have absolutely no incentive to comply with *Gerstein* and *McLaughlin*. With such a rule, there will be a significant deterrent effect. Officers will realize that if they promptly present the case to a judicial officer and then interrogate the defendant, his statements will be admissible; correspondingly, statements will not be admissible if the officers interrogate the defendant while delaying the probable cause determination.[16]

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[15] Were the *Brown* test applied, suppression would still be required in the present case. As noted *supra*, the temporal proximity of a *Gerstein-McLaughlin* violation is immediate and there can be no intervening circumstance. When this is the case, it is questionable whether the purpose of the officers should enter into the calculus at all. *See United States v. Johnson*, 626 F.2d 753, 758-59 (9th Cir. 1980), *aff'd on other grounds*, 457 U.S. 537 (1982). Even if it does, the arresting officers' purpose and conduct here can hardly be viewed as laudable. They held Mr. Alvarez for over 2½ days, apparently just because it was inconvenient to contact the Secret Service over the weekend. They then delayed Monday morning for the specific purpose of letting the Secret Service conduct a custodial interrogation before Mr. Alvarez could go to court. Even if there might be some claim of "good faith", the Court has expressly rejected that as a basis for finding attenuation under *Brown*. *See Taylor v. Alabama*, 457 U.S. 687, 693 (1982). Any such claim must be analyzed under this Court's "good faith exception" case law. *See infra* pp. 39-49.

[16] Mr. Alvarez's waiver of *Miranda* rights does not bar this claim, moreover. In *Brown v. Illinois*, 422 U.S. 590 (1975), the Court flatly rejected the argument that a waiver of *Miranda* rights also constituted a waiver of fourth amendment rights. *See id.* at 601. The Court pointed out:

B. This Court Should Consider The McLaughlin Issue Even Though The Issue Was Not Raised Below.

It is well established that a respondent can defend the judgment below on any ground without the need for a cross-petition for writ of certiorari. *See Reno v. Flores*, 113 S. Ct. 1439, 1446 n.3 (1993); *Massachusetts Mut. Life Ins. Co. v. Ludwig*, 426 U.S. 479, 480 (1976); *United States v. American Ry. Express Co.*, 265 U.S. 425, 435-36 (1924). In general, however, the issue must be one which was "properly raised below". *Reno v. Flores*, 113 S. Ct. at 1446 n.3. Mr. Alvarez did not raise a *McLaughlin* claim in either the district court or the court of appeals.

There are exceptions to the general rule that the Court will consider an issue only if it was raised below, however. *See, e.g., Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980); *Hormel v. Helvering*, 312 U.S. 552, 557-59 (1941). One of the most fundamental of these exceptions is for cases "in which there have been judicial interpretations of existing law after decision below and pending appeal – interpretations which if applied might have materially altered the result. (Footnote omitted.)" *Id.* at 558-59.

McLaughlin – which was issued after briefing and argument in the court of appeals in the present case – was

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> Arrests made without warrant or without probable cause, for questioning or "investigation" would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving *Miranda* warnings. (Footnote omitted.) Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a "cure-all,". . . .

Id. at 602-03.

The same is true in the case of a *Gerstein-McLaughlin* violation.

such an interpretation of existing law. While there were prior lower court decisions construing *Gerstein* to place limits on detention prior to a judicial determination of probable cause, those decisions took a very different approach than that taken in *McLaughlin*.

In particular, the prior case law did not recognize a presumptive time limit on the period of detention, but took a case-by-case approach. The courts focused on the circumstances of the particular jurisdiction in question, including geography, available resources, caseloads, and other broad systemic conditions. *See, e.g., Williams v. Ward*, 845 F.2d 374 (2d Cir. 1988); *Bernard v. City of Palo Alto*, 699 F.2d 1023, 1024-25 (9th Cir. 1983); *Fisher v. Washington Metropolitan Area Transit Authority*, 690 F.2d 1133, 1140 (4th Cir. 1982); *Sanders v. City of Houston*, 543 F. Supp. 694 (S.D. Tex. 1982), *aff'd*, 741 F.2d 1379 (5th Cir. 1984); *Lively v. Cullinane*, 451 F. Supp. 1000 (D.D.C. 1978). *See generally* Brandes, *Post-Arrest Detention and the Fourth Amendment: Redefining the Standard of Gerstein v. Pugh*, 22 Col. J.L. & Soc. Prob. 445, 447 (1989). Different courts had set time limits ranging from 1½ to 72 hours. *Compare Lively v. Cullinane*, 451 F. Supp. at 1003, 1009 *with Williams v. Ward*, 845 F.2d at 387.

As a result of this approach, the issue of excessive detention in violation of *Gerstein* had been raised largely in the context of civil actions, most commonly class actions. The courts typically focused on broad systemic factors requiring the compilation of voluminous statistical and bureaucratic information. *See, e.g., Williams v. Ward*, 845 F.2d at 390-92; *Sanders v. City of Houston*, 543 F. Supp. at 697-99; *Lively v. Cullinane*, 451 F. Supp. at 1006-08; *Bernard v. City of Palo Alto*, 699 F.2d at 1024-25. Without the ability to conduct depositions and other civil discovery and with the greater constraint of criminal

speedy trial concerns, it was difficult, if not impossible, to raise the issue in the criminal context.

This Court's opinion in *McLaughlin* worked a significant change in the law by creating a presumption which shifts the burden of proof to the government when the detention exceeds 48 hours. The Court recognized that this was a very different and more simplified approach.

> Unfortunately, as lower court decisions applying *Gerstein* have demonstrated, it is not enough to say that probable cause determinations must be "prompt." This vague standard simply has not provided sufficient guidance. Instead, it has led to a flurry of systemic challenges to city and county practices, putting federal judges in the role of making legislative judgments and overseeing local jailhouse operations. (Citations omitted.)
>
> Our task in this case is to articulate more clearly the boundaries of what is permissible under the Fourth Amendment.

Id. at 1669-70. The Court then went on to establish a bright-line rule that detentions of up to 48 hours prior to a probable cause determination were presumptively valid and that the burden would shift to the government to demonstrate "a bona fide emergency or other extraordinary circumstance" if the delay exceeded 48 hours. *Id.* at 1670.

The creation of such a bright-line rule and burden-shifting presumption changed the law in a way which is critical in a criminal case. With such a presumption, a party does not need extensive civil discovery and more relaxed civil time constraints to effectively raise and litigate the issue. Rather, a defendant who is detained for more than 48 hours may rely on the presumption alone. This is a change in the law which, given the more than 60-hour delay in the present case, might – indeed, would –

"have materially altered the result", *Hormel v. Helvering*, 312 U.S. at 559.

Further, Mr. Alvarez raised his *McLaughlin* argument at the first opportunity – in his brief in opposition to the government's petition for writ of certiorari. *Compare Steagald v. United States*, 451 U.S. 204, 211 n.5 (1981) (even though decision on which government sought to rely had issued, it did not oppose certiorari on new ground). In the courts below, moreover, Mr. Alvarez did challenge the admissibility of his confession on the basis of the delay in arraignment; he simply challenged it under 18 U.S.C. § 3501 rather than on a fourth amendment theory. *Cf. Anderson v. United States*, 417 U.S. 211, 217 n.5 (1974) (noting that petitioners did challenge admissibility of testimony on some grounds); *United States v. Mulder*, 889 F.2d 239, 240 (9th Cir. 1989) (describing defendant as simply "recrafting his arguments on appeal to fit within [intervening] decision's framework"). Given these circumstances, this Court should either consider the *McLaughlin* issue itself or remand for the court of appeals to consider the issue.

C. The Good Faith Exception Does Not Preclude Application Of The Exclusionary Rule In The Present Case.

In *Illinois v. Krull*, 480 U.S. 340 (1987), this Court recognized a good faith exception which precludes application of the exclusionary rule when a law enforcement officer conducting a search or seizure reasonably relies upon a statutory provision which is only later held to be unconstitutional. *See id.* at 349-55. The Court extended *United States v. Leon*, 468 U.S. 897 (1984), which recognized a good faith exception to the exclusionary rule when a law enforcement officer reasonably relies upon a search warrant issued by a magistrate, *see id.* at 922. The

test is the objective one of what a reasonably well-trained officer would have believed. *See Krull*, 480 U.S. at 355; *Leon*, 468 U.S. at 922-23 & n.23.

In the present case, the officers who arrested and held Mr. Alvarez claimed to rely on a California statute. *See* Pet. App. 57a. In its reply to Mr. Alvarez's brief in opposition to the petition for writ of certiorari, the government argued that this makes the *Krull* good faith exception applicable. *See* Reply Brief for the United States, at 8 n.3. *Krull* does not save the government, however, for three reasons.

1. Non-compliance with statutory requirements.

California Penal Code § 825 is the statute upon which the state officers apparently relied. It provides: "The defendant must in all cases be taken before the magistrate without unnecessary delay, and, in any event, within two days after his arrest, excluding Sundays and holidays; . . . . " *Id.* The California courts have held that the inclusion of the two-day limit in addition to the general prohibition against "unnecessary delay" "does not mean that any delay is reasonable so long as the 48-hour maximum limitation period has not been reached." *People v. Williams*, 68 Cal. App. 3d 36, 43, 137 Cal. Rptr. 70 (1977). The delay must be necessary. *People v. Thompson*, 27 Cal. 3d 303, 329, 165 Cal. Rptr. 289, 611 P.2d 883 (1980).

Further, delay for the purpose of investigation and, in particular, for interrogation of a defendant is a form of unnecessary delay which is not permissible under the statute. *See People v. Powell*, 67 Cal. 3d 32, 60, 59 Cal. Rptr. 817, 429 P.2d 137 (1967); *Matter of Michael E.*, 112 Cal. App. 3d 74, 79, 169 Cal. Rptr. 62 (1980). The permissible reasons for delay include only the time needed:

> [T]o complete the arrest; to book the accused; to transport the accused to court; for the district attorney to evaluate the evidence for the limited purpose of determining what charge, if any, is to be filed; and to complete the necessary clerical and administrative tasks to prepare a formal pleading.

People v. Thompson, 27 Cal. 3d at 329, *quoting People v. Williams*, 68 Cal. App. 3d at 43.

Here, the record reflects that the delay was not for one of the "necessary" purposes under Penal Code § 825. One of the local officers indicated that the district attorney had already declined prosecution. Pet. App. 54a. Another claimed that the case was never presented to the district attorney and would have been presented only if the Secret Service decided not to prosecute. Pet. App. 59a. In any event, the sole reason for at least some of the delay was to permit the Secret Service to interrogate Mr. Alvarez. This is precisely the sort of delay which is "unnecessary" under Section 825.

As a result, the good faith exception established in *Krull* does not apply. For an officer to rely on the exception, he must comply with the statute upon which he claims to be relying. Here, the officers did not do that.

2. Permissive nature of statute.

Krull is also inapplicable because California Penal Code § 825 is a different type of statute than the statute in *Krull*. Assuming *arguendo* that Section 825 permits delay for reasons such as those in the present case, it is a permissive statute which *allows*, but does not *require*, such delay. The statute at issue in *Krull*, in contrast, imposed a *duty* to conduct administrative searches and provided no ready alternative. *See Krull*, 480 U.S. at 350 (referring to "an officer who has simply fulfilled his *responsibility* to enforce the statute as written" (emphasis added)).

The distinction between permissive and mandatory statutes is highly significant in its implications for the relative costs of the exclusionary rule. The main rationale for the rule is deterrence of police misconduct; it "operates as 'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, ... '" *United States v. Leon*, 468 U.S. at 906 (*quoting United States v. Calandra*, 414 U.S. 338, 348 (1974)). The Court has indicated that in considering exceptions to the exclusionary rule, it will weigh the costs and deterrent effect of the rule in a particular context. *See Leon*, 468 U.S. at 908-13.

The cost of an officer not relying upon statutes such as those at issue in *Krull* is that in some instances a statute later held to be constitutional will not have been enforced. As the Court recognized with respect to substantive criminal statutes in *Michigan v. DeFillipo*, 443 U.S. 31 (1979): "Society would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement." *Id.* at 38. Society is not so ill-served when an officer simply declines to rely on a permissive statute, for the only "harm" is that the suspect will receive the constitutional rights which he is due more quickly than may have been required.[17]

Such a qualitative difference in costs suggests that the *Krull* good faith exception to the exclusionary rule

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[17] In the present case, it may not have been possible for the officers to bring Mr. Alvarez to court on the weekend if the county had not created that option in response to the *Bernard v. City of Palo Alto* decision, discussed *infra* pp. 43-44. It is questionable whether the county's intransigence in this respect should constitute an excuse; however, the Court need not consider this. Mr. Alvarez was held into the late morning of a weekday when the courts would have been in session.

should not apply to permissive statutes such as that in the present case. There is no significant cost to non-reliance upon a permissive statute. And there is a potential gain – in the form of (1) not encouraging legislative and/or law enforcement reliance upon "grace periods" for statutes of questionable validity; (2) not discouraging defendants from challenging such statutes' validity; and (3) reducing litigation over the question of how much law an officer must know. *See generally Krull*, 480 U.S. at 366-69 (O'Connor, J., dissenting). In the case of *permissive* statutes for which the countervailing costs of non-reliance are minimal, these benefits tip the balance the other way, and the *Krull* good-faith exception should not apply.

3. Unreasonable reliance on statute.

Even were the good faith exception to be extended to permissive statutes, there is no basis here for a finding of good faith. Several years prior to the arrest of Mr. Alvarez, a county regulation which tracked and sought to implement the California Penal Code prompt arraignment provisions had been invalidated in *Bernard v. City of Palo Alto*, 699 F.2d 1023 (9th Cir. 1983). The *Bernard* court ruled that the California procedures fell short of fourth amendment requirements and affirmed a district court ruling limiting the maximum permissible detention in Santa Clara County to 24 hours. *See id.* at 1025. After *Bernard*, therefore, a reasonable officer would have known that there are fourth amendment constitutional requirements which limit California Penal Code § 825. *Compare State v. White*, 97 Wash. 2d 92, 103-04, 640 P.2d 1061 (1982) (no good faith reliance on substantive statute where comparable statute had been ruled void for vagueness) *with United States v. Peltier*, 422 U.S. 531, 540-42 (1975) (exclusionary rule inapplicable where officer relied

upon "a validly enacted statute, supported by longstanding administrative regulations *and continuous judicial approval*" (emphasis added)).[18]

Bernard did not clearly establish, however, that the 24-hour limit adopted in that case was the maximum period of detention permissible in Los Angeles County, where Mr. Alvarez was arrested. As had other courts before *McLaughlin*, *see supra* p. 37, the court in *Bernard* emphasized the particular circumstances of the county and agencies which were the defendants in that case. *See Bernard*, 699 F.2d at 1024-25.

A reasonable officer thus may not have been certain that holding a suspect in Los Angeles County for as long as Mr. Alvarez was held violated the fourth amendment. But a reasonable officer would have known that there was a strong likelihood he was violating the fourth amendment; he would have entertained serious doubts about the constitutionality of his actions and been conscious of a substantial risk that he was violating Mr. Alvarez's rights. Such a state of mind is what is commonly characterized as "recklessness" or "reckless disregard". *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 335 n.6 (1974); *Model Penal Code* § 2.02(2)(c) (1985).

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[18] While not explicitly stating such a proposition, this Court's decisions implicitly recognize that a reasonable officer would have knowledge of the basic case law governing his conduct. *See Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) ("a reasonably competent public official should know the law governing his conduct"). As Professor LaFave has noted, the question is "what kind of error . . . would be made by a reasonable officer who had been reasonably trained in the law." 1 W. LaFave, *Search and Seizure* 62 (2d ed. 1987). In the fourth amendment context, this must include case law, for there is little or no statutory law. *Munz v. Ryan*, 752 F. Supp. 1537, 1543 (D. Kan. 1990).

The Court in *Krull* and *Leon* did not address this "in between" state of mind – where a reasonable officer would neither know with certainty his actions were *not* constitutional nor sincerely believe they *were* constitutional. Instead the Court expressed the test in both an affirmative and negative fashion. In *Krull*, the Court enunciated the test as whether "a reasonable officer should have *known* that the statute *was unconstitutional*", *id.* at 355 (emphasis added), but also quoted a description of the test in *Leon* as whether officers "cannot reasonably *presume* [the warrant] to *be valid*", *Krull*, 480 U.S. at 355 (*quoting Leon*, 468 U.S. at 923 (emphasis added)). In *Leon* the Court described the test in both ways also, stating it first as whether officers "acted in the objectively reasonable *belief* that their conduct *did not violate* the Fourth Amendment", *Leon*, 468 U.S. at 918 (emphasis added), but then as "whether a reasonably well trained officer would have *known* that the search *was illegal* despite the magistrate's authorization," *id.* at 922 n.23 (emphasis added). In the companion case to *Leon*, *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), the Court appeared to expressly leave the middle ground of recklessness open; it stated that it was not deciding the issue of "[w]hether an officer . . . who has unalleviated concerns" may rely on the good faith exception. *Id.* at 989 n.6.[19]

The Court's treatment of reckless disregard in other contexts, however, compels a holding that the good faith exception does not apply when a reasonable officer would be acting in reckless disregard of constitutional rights. In *Leon*, the Court held that *Franks v. Delaware*, 438

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[19] There is a similar omission in the Court's qualified immunity civil rights cases, which use the same test as the good faith exception cases. *See, e.g., Anderson v. Creighton*, 483 U.S. 635, 640-41 (1987); *Malley v. Briggs*, 475 U.S. 335, 344-45 (1986).

U.S. 154 (1978) precludes application of the good faith exception when the affiant provides information which he "would have known was false except for his reckless disregard of the truth." *Leon*, 468 U.S. at 923. The Court noted in *Franks* that, while information in an affidavit need not be " 'truthful' in the sense that every fact recited . . . is necessarily correct", "surely it is to be 'truthful' in the sense that the information put forth is believed or appropriately accepted by the affiant as true." *Franks*, 438 U.S. at 165. Similarly, an officer who relies upon a statute must "believe or appropriately accept" it to be valid.

Extending the good faith exception to situations in which a reasonable officer would be acting with reckless disregard for a suspect's constitutional rights would also conflict with this Court's holding in the qualified immunity case of *Smith v. Wade*, 461 U.S. 30 (1983). In *Smith*, the Court held that a governmental official's qualified immunity did not preclude an award of punitive damages when the official acted with "reckless or callous disregard for the plaintiff's rights." *Id.* at 51. The standard for qualified immunity in the civil rights context is identical to the standard for the good faith exception. *See Malley v. Briggs*, 475 U.S. 335, 344 (1986).

The purpose underlying the exclusionary rule and the good faith exception also suggests that what would have been reckless disregard for constitutional rights[20]

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[20] Since the good faith exception incorporates an objective test, the question is not whether the officer was subjectively aware of a substantial risk that he was violating a suspect's rights; rather, the test must be the objective one of whether a reasonable officer would have been aware of a substantial risk that he was violating the suspect's rights. This objective standard has the benefit of avoiding the "grave and fruitless misallocation of judicial resources" which would arise from

should not be viewed as coming within the good faith exception. As recognized in *Leon*:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

Leon, 468 U.S. at 919 (*quoting United States v. Peltier*, 422 U.S. at 539).

There is no "complete good faith" where a reasonable officer would be consciously aware of a substantial risk that he is violating constitutional rights. *Accord* Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 Mich. L. Rev. 1319, 1412-13 (1977) ("the requirement that the officer act in 'good faith' is inconsistent with closing one's mind to the *possibility* of illegality" (emphasis added)), *quoted in Leon*, 468 U.S. at 920 n.20. In these circumstances, a reasonable officer would know there is a correspondingly substantial risk that the evidence he develops through his actions is subject to suppression. *Compare Peltier*, 422 U.S. at 542 (no deterrent effect when lower courts consistently upheld statute). This will make officers more careful in this context, just as the reckless disregard standard makes officers more

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"sending state and federal courts on an expedition into the minds of police officers." *Leon*, 468 U.S. at 922 n.23 (*quoting Massachusetts v. Painten*, 389 U.S. 560, 565 (1968) (White, J., dissenting)).

careful about the statements in their search warrant affidavits.

A secondary purpose of the exclusionary rule will also be advanced. There has been a recognition by the Court that at times a concern for judicial integrity also underlies the exclusionary rule, at least in "unusual circumstances". *Leon*, 468 U.S. at 921-22 n.22; *see also id.* at 976-78 (Stevens, J., dissenting). This rationale is particularly significant in a case involving reckless disregard of court decisions which raise doubts about a statute's constitutional validity. Such reckless disregard shows a lack of concern both for the Constitution and the judicial system which through its decisions has created the grounds for doubt. *Cf. Franks v. Delaware*, 438 U.S. at 165 ("it would be an unthinkable imposition upon [the magistrate's] authority if a warrant affidavit, revealed after the fact to contain a deliberately or recklessly false statement, were to stand beyond impeachment").

While there is a burden on the officer in the field to know and apply certain basic constitutional principles to statutes, this is not a function of how the Court treats reckless disregard. Even if the Court were to treat bad faith as requiring that a reasonable officer *know* a statute is unconstitutional, it would be requiring an officer to know and apply legal principles. *See Krull*, 480 U.S. at 367 (O'Connor, J., dissenting). Judging whether there is a strong likelihood that conduct is unconstitutional requires no more or less legal sophistication than judging whether the conduct is definitely unconstitutional; the only difference is in where the officer must draw the line.

The way in which to minimize the legal sophistication required of officers in the field is by requiring that the legal principles officers must know be "clearly established". *See Anderson v. Creighton*, 483 U.S. 635, 639 (1987);

Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). In the present case, there was a clearly established legal rule at the time Mr. Alvarez was arrested: California Penal Code § 825 was limited by more stringent fourth amendment requirements, the stringency of which depended upon the particular jurisdiction's circumstances. The only thing which was not clear was the factual findings a court might make when presented with a particular jurisdiction's circumstances.

The bottom line as to "good faith" is this. Any reasonable officer would have known – in light of the clearly established law existing at the time – that he was walking a fine line between constitutional and unconstitutional conduct. When a reasonable officer would know this and acts despite the risk, he should not be permitted to cry "good faith" when it turns out he has stepped over the line, especially when he is merely taking advantage of a permissive statute.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,
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January 1994

No. 92-1812

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

PEDRO ALVAREZ-SANCHEZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

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1. The dispositive threshold question in this case is whether an arrest on state-law charges and the ensuing custody by state officers is an "arrest or other detention" under 18 U.S.C. 3501(c). Respondent's arguments on that threshold question fail to cast any doubt on the correctness of our analysis.

a. Respondent's principal textual argument (Br. 16-17) is that Section 3501(c)'s reference to "any" law enforcement officer is broad enough to encompass the conduct of state officers. We have never claimed, however, that arrests by state officers cannot be "arrest[s]" under Section 3501(c). Our submission is that the "arrest or other detention" of which Section 3501(c) speaks must be for a violation of federal law, regardless of whether federal or state officers effect the arrest. Thus, if a police

officer discovers in the course of a routine traffic stop that the motorist has an outstanding federal arrest warrant, his decision to execute that warrant gives rise to an "arrest" under Section 3501(c). If, on the other hand, the officer arrests the motorist for a state traffic offense, the arrest is not an arrest that triggers Section 3501(c).

The text of Section 3501(c) makes clear that the "arrest or other detention" must be for a violation of federal law. The first sentence of Section 3501(c) addresses the "delay" between the defendant's arrest and the time he is taken "before a magistrate * * * empowered to commit persons charged with offenses against the laws of the United States"—*i.e.*, a magistrate authorized to grant or deny bail for federal offenses. That focus is confirmed by the proviso that immediately follows, which extends the six-hour safe harbor provided by the first sentence in cases in which a delay reasonably results from the unavailability of "such magistrate." But there can be no "delay" in taking a person who has been arrested for a state crime before a federal magistrate, because such state arrests do not trigger federal presentment obligations.[1]

[1] It is unclear what respondent means when he argues (Br. 16) that the statute's reference to "any law enforcement officer" must be "contrast[ed]" with its reference to judicial officers "empowered to commit persons charged" with federal crimes. If he means to suggest merely that actions by state officers can sometimes trigger the operation of Section 3501(c)—when state officers take it upon themselves to arrest a person for a violation of federal law—he makes a narrow point that we have never disputed. If, however, he means to suggest that arrests by "any" law enforcement officer always trigger Section 3501(c), respondent's argument would have the bizarre effect of requiring state officers to present violators of local law to federal magistrates having no jurisdiction over those violations. The two phrases that respondent would "contrast" are part of a single continuous sentence, the natural reading of which is that the arrests or detentions must be for "offenses against the laws of the United States," regardless of which law enforcement officers make the arrests.

Moreover, nothing in the statute supports respondent's claim (Br. 17-18) that all arrests must be deemed to trigger Section 3501(c) whenever the defendant is eventually charged with a federal crime. If an arrest for a state-law offense does not create an immediate obligation to take the defendant to a federal magistrate—and is therefore not an "arrest" under Section 3501(c)—later events cannot retroactively transform the exercise of state authority into a federal arrest, so that all the time that elapsed after the State's action is suddenly transformed into impermissible "delay." Section 3501(c) contains no hint that the question whether arrests fall within its ambit turns on the outcome of subsequent charging decisions, much less that "delay" will be deemed to arise by operation of law well after nothing can be done to prevent it. The anomaly of such a retroactive transformation of custody from state to federal is particularly apparent when coupled with respondent's further claim (Br. 26-27) that any statements obtained during state custody—*i.e.*, during the period that later events transform into impermissible "delay"—must be suppressed as a sanction for the government's misconduct in failing to present the defendant to a federal magistrate within six hours of his state arrest.

b. Like the statutory text, the history of Section 3501 gives no support to respondent's proposed construction of the statute. We do not, as respondent claims, urge "as a principle of statutory construction" the proposition that all defendants must lose claims under Section 3501

because "Congress was in an 'anti-defendant' mood when it considered and passed the statute." Br. 20-21. Our point is that it is anomalous to hold that Section 3501 is *broader* than the *McNabb-Mallory* rule, which Congress intended to eliminate by passing that statute.[2] Even the *McNabb-Mallory* rule did not require suppression of a confession made by a defendant while in state custody unless he demonstrated that state and federal officers colluded to use state custody to deprive him of his right to a speedy federal presentment. See, *e.g.*, *United States* v. *Coppola*, 281 F.2d 340, 344 (2d Cir. 1960) (en banc), aff'd, 365 U.S. 762 (1961).

Respondent attempts to avoid that anomaly by claiming that this Court's decisions in *Anderson* v. *United States*, 318 U.S. 350 (1943), and *Coppola* v. *United States*, 365 U.S. 762 (1961), never established a requirement of a collusive "working arrangement,"[3] and he cites a number

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[2] Citing two statements made during the Senate debate (Br. 23), respondent contends in passing that the legislative history supports the result reached by the court of appeals. The first of those statements supports our submission that the arrest must be for a violation of federal law. That statement describes a scenario in which a "sheriff picks up a man under the Dyer Act" for transporting a stolen car across state lines. The Dyer Act, 18 U.S.C. 2311 *et seq.*, is a federal statute that proscribes the interstate transportation of stolen property, and an arrest "under" that act would necessarily be an arrest for a violation of federal law. The second statement, which notes that the arresting officer may need to check "with officers in another State," does not bear at all on the nature of the charges for which the arrest is effected. The federal government has law enforcement officers in every State of the Union. And it is not at all uncommon for a defendant to be arrested in one State on the basis of an arrest warrant issued by a federal district court sitting in another State.

[3] Respondent seeks to distinguish *Anderson* on the ground that a "working arrangement" merely happened to be present in that

of cases to support to that claim. Yet the cases he cites actually refute his argument. For example, in *Barnett* v. *United States*, 384 F.2d 848 (5th Cir. 1967), the court emphasized that in order to bring the *McNabb-Mallory* rule "into play there must be detention 'by or at the instance of federal officers,'" and that therefore "[t]he necessary inquiry is whether the cooperation between state and federal officials had *as its purpose* * * * to permit in-custody investigation and interrogation by federal officials without compliance with Rule 5(a)." *Id.* at 857, 858 (emphasis added) (quoting *White* v. *United States*, 200 F.2d 509, 513 (5th Cir. 1952)). And in *Burke* v. *United States*, 328 F.2d 399, 403 (1st Cir.), cert. denied, 379 U.S. 849 (1964), the court noted that the defendant

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case. Br. 21. *Anderson*, however, made clear that the existence of the collusive arrangement was the ground on which reversal of the judgment was based; for it was that "working arrangement between the federal officers and the sheriff of Polk County *which made possible the abuses*" found by the Court. 318 U.S. at 356 (emphasis added).

Respondent's attempt to distinguish *Coppola* as a case in which the defendant had been arraigned on state charges likewise fails. In *Coppola*, the FBI alerted state authorities to the fact that Coppola had committed a state offense, furnished them with photographs of Coppola and his two confederates, and told them where Coppola could be found. 281 F.2d at 342. After the state authorities arrested Coppola, they promptly informed the FBI of the arrest. The FBI then interrogated Coppola at length *before* any state charges were ever filed or Coppola was arraigned on them. *Ibid.* It was conceded that the interrogation in that case took place while the defendant's custody was illegal under New York law by reason of the failure of state authorities to arraign him promptly. *Id.* at 341 n.1. The court of appeals nonetheless concluded that "whether a detention is illegal under state law has no bearing upon the propriety of receiving admissions in evidence in a federal criminal proceeding." *Ibid.* This Court summarily affirmed.

had not been "arrested by the Boston police solely for the federal authorities." Accordingly, the fact that the Boston police informed federal postal inspectors of the arrest, and the "subsequent visit [of a postal inspector] to Boston Police Headquarters to question [the defendant] did not make [the defendant] a federal prisoner and bring him under the protection of Rule 5(a)." *Ibid.* (citing *Coppola*). Other cases cited by respondent are to the same effect.[4]

c. In this case, there was plainly no "working arrangement" of the type required by *Anderson* and *Coppola*—*i.e.*, an agreement to execute an arrest in order to evade Rule 5(a), see *Coppola*, 281 F.2d at 344—because

[4] For example, *Cram* v. *United States*, 316 F.2d 542 (10th Cir. 1963), cited by respondent for the proposition that *McNabb-Mallory* required suppression unless a state arrestee was arraigned on the state charges (Br. 22), in fact considered and specifically *rejected* that proposition in dictum. *Id.* at 544. Accord *Barnett* v. *United States*, 384 F.2d at 856 (violation of state arraignment requirement does not require suppression of statement made to federal officers). Instead, citing *Coppola*, the *Cram* court upheld the admission of the confession, explaining that there was "no evidence here of any collaboration or working agreement between the state and federal authorities relating to the arrest and the detention of [the defendant], *and such an arrangement must be shown in order to invoke the rule of the Anderson case.*" 316 F.2d at 544-545 (emphasis added).

In *United States* v. *Hindmarsh*, 389 F.2d 137 (6th Cir.), cert. denied, 393 U.S. 866 (1968), also cited by respondent (Br. 22), the court likewise upheld admission of the confession based on the very standard that respondent contends was not the law prior to the enactment of Section 3501. As the court noted, "[t]he prime factor distinguishing *Coppola* and this case from *Anderson* is that the detention by state officers was not *for the purpose of aiding and abetting the federal officers* in carrying on interrogation of the suspect in violation of Federal Rule 5(a)." 389 F.2d at 146 (emphasis in original).

federal agents did not even learn of respondent's existence until Monday morning, and thus they could not have solicited or procured respondent's arrest on Friday or his Friday-to-Monday custody. The district court therefore properly concluded that there was "no evidence" that "a collusive arrangement between state and federal agents * * * caused the confession to be made." Pet. App. 50a. Indeed, while respondent suggested at the petition stage the possibility that there was a "working arrangement" between the state and federal authorities, he no longer pursues that claim.

Respondent now appears to claim instead that the arrest was federal from the outset, because the state officers subjectively intended to enforce only federal law and had no intention to pursue state charges. Br. 18. For that reason, he claims that the Court need not decide how to treat state custody when state officers are "enforcing their own laws." *Ibid.* When we sought review, however, we made clear that the state officers began by obtaining a warrant to search respondent's residence for evidence of narcotics activity "constituting a felony under California law," and that respondent was arrested by the state officers when the search in fact turned up such evidence. Pet. 3. In his brief in opposition, respondent specifically agreed with our statement of the facts, adding only that the arrest and ensuing custody were *also* based on the state officers' desire to "consider[] *state* charges against [respondent] involving the counterfeit currency." Br. in Opp. 1-2 (emphasis added). In light of his concessions at the petition stage, respondent may not now claim for the first time that the state officers were not enforcing their own laws at all.

See, *e.g.*, *Oklahoma City* v. *Tuttle*, 471 U.S. 808, 815-816 (1985).[5]

2. a. Under Section 3501(a), a confession must be admitted if the district court finds it voluntary. Respondent no longer disputes the voluntariness of his confession.[6] Instead, he contends that, notwithstanding Section 3501(a), the "plain language" of Section 3501(c) requires the suppression of any confession made more than six hours after arrest, because Section 3501(c) "determines when confessions will be 'inadmissible solely because of delay.'" Br. 6 (emphasis omitted). Respondent, however, omits the key language of the statute: Section 3501(c) does not establish a rule for suppression, but instead determines when confessions "shall *not* be inadmissible solely because of delay." 18 U.S.C. 3501(c) (emphasis added). Section 3501(c) thus provides law enforcement officers with a safe harbor by prohibiting suppression on grounds of delay when a confession is made within six hours of arrest. It says nothing at all about the admissibility of confessions made after that six-hour period. The admissibility of confessions made outside the six-hour safe harbor period is left to other provisions and principles of law, including Section 3501(a), which provides that a voluntary confession "shall be admitted."[7]

[5] Respondent urges this Court to find that the California officers effected a federal arrest solely on the ground that the officers "knew of the federal offense from the beginning and showed deference to federal interests," as shown by the fact that they notified the Secret Service of the discovery of counterfeit currency and later permitted the Secret Service agents to question and arrest respondent. Br. 18. But state officers do not act as federal agents whenever they are aware that a defendant may be guilty of a federal crime, or when they simply provide information to their federal counterparts. As this Court has repeatedly recognized in various contexts, such cooperation as the record discloses here "is the conventional practice between the two sets of prosecutors throughout the country" and it does not establish that state authorities acted as a cat's paw for the federal government. *Bartkus* v. *Illinois*, 359 U.S. 121, 123 (1959). See also *Abel* v. *United States*, 362 U.S. 217, 229-230 (1960); *United States* v. *Coppola*, 281 F.2d at 345.

[6] Respondent contended at the petition stage that certiorari should be denied because the court of appeals indicated in a footnote to its opinion that it would find his confession involuntary if it confronted the question. Br. in Opp. 11-12. We pointed out in our reply brief at the petition stage that the Ninth Circuit's suggestion to that effect was based on a "balancing" of policy considerations against free will factors, and that such balancing was legally erroneous. Reply Br. 5 n.2. Respondent's brief on the merits makes no claim that his confession was involuntary under the correct legal standard.

[7] Respondent also suggests (Br. 7-8) that our reading of Section 3501(c) fails to give effect to every word of that section. He notes that Section 3501(c) conditions the availability of the safe harbor on (1) a delay that does not exceed six hours, and (2) the voluntariness of the confession. Respondent argues that "[i]f Section 3501(a) is construed to override Section 3501(c), the only requirement for admission of *any* confession" will be voluntariness, thus rendering the six-hour provision "meaningless." Br. 7. We agree that the sole test for admissibility is voluntariness, but we do not see how that test renders Section 3501(c) "meaningless." The six-hour provision is a safe harbor. The point of a safe-harbor provision—here as elsewhere in the law—is not to change the legal principles that govern a claim, but to provide certainty with respect to specific recurring factual situations. Thus, Congress provided that the sole test for the admissibility of confessions is voluntariness, 18 U.S.C. 3501(a), and that in assessing voluntariness a court may consider a delay in presentment among other factors, 18 U.S.C. 3501(b). Because Congress believed that interrogation was a desirable investigative technique, it provided that a six-hour delay for that purpose could not be deemed to render a confession inadmissible if the confession was otherwise voluntary. 18 U.S.C. 3501(c); see 114 Cong. Rec. 14,184 (1968) (remarks of Sen. McClellan).

b. The linchpin of respondent's claim that Section 3501(c) authorizes suppression based on delay is the proposition that the legislative history of that statute shows that it was intended to codify the *McNabb-Mallory* rule for any delay exceeding six hours. Br. 14-15. Respondent cites no statement by any legislator suggesting that a codification of *McNabb-Mallory* was intended. To the contrary, as respondent acknowledges (Br. 9, 13), the Senate Judiciary Committee and numerous Senators and Representatives stated that Section 3501 would *overrule* the *McNabb-Mallory* doctrine. Respondent merely asserts that the Senators who advocated overruling *McNabb-Mallory* abandoned that objective and reached, as a "compromise," precisely the opposite result.

Respondent does not base that implausible conclusion on any floor statement that adverted to a "compromise."[8] Respondent argues instead that, in light of the controversial nature of the bill, the Senate's addition of the six-

[8] To the contrary, Senator Scott's description of the six-hour provision as a "very simple amendment" to which he had "heard of no objection," 114 Cong. Rec. 14,184 (1968), indicates that he did not perceive the change he was proposing as one that would alter the essential character of the bill. Senator Scott went on to explain that his proposal was intended to forestall a successful attack on the constitutionality of Section 3501(c), since he thought the statute would be of "doubtful validity" if it were applied to forbid suppression of a confession obtained after "a 36- or a 24-hour interrogation." 114 Cong. Rec. 14,185-14,186 (1968). The *McNabb-Mallory* doctrine, of course, had no constitutional underpinning. See S. Rep. No. 1097, 90th Cong., 2d Sess. 40 (1968). Senator Scott's explanation of his amendment therefore makes clear that he sought the change only because he envisioned some situations in which a lengthy delay used for interrogation would render a confession involuntary, and he did not think Section 3501(c) should bar suppression in those circumstances.

hour provision to Section 3501(c) must be taken to reflect an intention to retain *McNabb-Mallory*. Br. 9-10. Respondent supports that claim by citing a few floor statements that referred to the six-hour period as a limit on the time during which interrogation could take place. Br. 12-13 & n.7. As respondent acknowledges, however, several of the floor statements he cites also expressly recognized that the bill would "obviously * * * repeal" or "overrul[e]" *Mallory*. Br. 13 & n.7. At most, those statements merely evince an intention—consistent with the creation of a safe-harbor period—that delays for interrogation should not last more than six hours. They do not speak at all to what, if any, consequences a longer delay would have for admissibility.

c. As we noted in our opening brief (Br. 36-38), the court of appeals erred even if the broadest form of the *McNabb-Mallory* rule remains the law, because the court rested its decision to suppress solely on the Monday-to-Tuesday delay that *followed* the confession. That delay cannot be deemed "unnecessary" in light of the district court's finding (Pet. App. 49a) that the delay was caused by the need to prepare a complaint and by the unavailability of a magistrate. And, in any event, *United States* v. *Mitchell*, 322 U.S. 65 (1944), established that any time that elapses *after* a confession may not be used to justify its suppression under the *McNabb-Mallory* doctrine.

Respondent's principal response is that the court of appeals' emphasis on the *post*-confession delay should be understood (contrary to what the court actually said) as intended to highlight the effect of the *pre*-confession delay. Apart from that implausible characterization of the court of appeals' rationale, respondent asserts that the court of appeals acted properly because the purpose of the post-confession delay was to interrogate him and

that the delay was therefore indefensible. Yet a claim that the post-confession delay was unjustifiable, even if true, would not serve to distinguish this case from *Mitchell*—there is no suggestion in *Mitchell* that the eight-day delay that followed the confession in that case had any proper purpose.

Moreover, the record does not support respondent's assertion that the purpose of the delay in this case was to interrogate him. To be sure, the court of appeals so stated in passing. Pet. App. 21a. But the district court made specific factual findings to the contrary. With respect to the period of state custody that preceded the confession, the district court specifically found "no evidence" of that improper purpose; the district court further concluded that the delay was not "the result of oppressive police practices prior to obtaining the confession" and did not "otherwise cause[] the confession." Pet. App. 49a. With respect to the delay that followed the confession, the district court found that it was caused by the need to prepare a complaint and by the unavailability of the magistrate. *Id.* at 49a-50a. The court of appeals did not hold that those findings are clearly erroneous, and indeed it could not have reached that conclusion under the applicable standard of review. See, *e.g.*, *Amadeo* v. *Zant*, 486 U.S. 214, 225-226 (1988). Nor has respondent even attempted to challenge those findings here. Those findings are therefore conclusive on him.[9]

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[9] Respondent alternatively suggests that Section 3501 requires suppression of any confession made more than six hours after his state arrest, because the statute merely codifies the *McNabb-Mallory* doctrine, under which suppression was mandatory. Br. 26-27. That claim fails even on the dubious assumptions that state officers effected the relevant arrest and that Section 3501 codifies the *McNabb-Mallory* doctrine. Under the *McNabb-Mallory* rule, the defendant bore the burden of showing a violation of Rule 5(a)—*i.e.*, *unnecessary* delay. See, *e.g.*, *Barnett* v. *United States*, 384 F.2d at 859. A finding of unreasonableness required at least that, as in *Mallory*, a magistrate was available "in regular course." *United States* v. *Ladson*, 294 F.2d 535, 537 n.1 (2d Cir. 1961), cert. denied, 369 U.S. 824 (1962); *Porter* v. *United States*, 258 F.2d 685, 689 (D.C. Cir. 1958) (Reed, J.) (presentment required only "during the ordinary professional hours of commissioners and judges"), cert. denied, 360 U.S. 906 (1959). Respondent has never alleged, much less established, that a magistrate was available in the ordinary course during his weekend in custody. And, even if a magistrate had been available during that period, respondent would have to show as well that "the officers * * * delayed arraignment for the sole purpose of subjecting him to constant interrogation." *United States* v. *Price*, 345 F.2d 256, 261 (2d Cir.), cert. denied, 382 U.S. 949 (1965). As we have noted, the district court specifically found to the contrary.

3. Respondent devotes much of his brief (Br. 27-49) to the proposition that this Court should affirm the judgment below on the alternative ground that, by holding him in custody over the weekend, the state authorities violated the Fourth Amendment. He relies on *County of Riverside* v. *McLaughlin*, 111 S. Ct. 1661 (1991), which held that the Fourth Amendment's requirement of a prompt judicial determination of probable cause generally means that such a determination must be provided within 48 hours of a warrantless arrest. Because he was not presented to a magistrate within 48 hours of his Friday arrest, respondent contends that his confession on Monday morning was the fruit of an unlawful detention.

a. The Court did not grant certiorari to consider any Fourth Amendment issue. And, as respondent concedes (Br. 36-39), he never moved in the district court to suppress his statements on Fourth Amendment grounds, nor did he make any Fourth Amendment argument to the court of appeals. Accordingly, even if the Court elects to address respondent's Fourth Amendment claim, that

claim is cognizable only if it satisfies the "plain error" standard of Fed. R. Crim. P. 52(b).

An essential requirement for a finding of plain error is obviousness. See *United States* v. *Young*, 470 U.S. 1, 14-17 & n.14 (1985). The doctrine authorizes review of forfeited claims only when the trial was "infected with error so 'plain' the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *United States* v. *Frady*, 456 U.S. 152, 163 (1982); see also *United States* v. *Merlos*, 8 F.3d 48, 50-51 (D.C. Cir. 1993) (obviousness requirement not met when error only became "plain" with a Supreme Court ruling issued well after the trial). Here, respondent states that he could not have made the Fourth Amendment argument before 1991, when *McLaughlin* "worked a significant change in the law." Br. 38. But respondent cannot plausibly claim on the one hand that the prosecutor and trial judge were derelict in tolerating the alleged Fourth Amendment error, and on the other hand that he should not be expected to have made a Fourth Amendment claim under the law as it stood at the time of the trial. Moreover, respondent has failed to show that the claimed error was so grievous as to "seriously affect[] the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Olano*, 113 S. Ct. 1770, 1779-1781 (1993); 4 Wayne R. LaFave, *Search and Seizure* § 11.7(d), at 522 (2d ed. 1987). Therefore, even if the Court elects to address respondent's Fourth Amendment claim, it should be rejected on plain error grounds.

b. In any event, the record does not demonstrate any violation of respondent's Fourth Amendment rights. This Court held in *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), that the Fourth Amendment requires a judicial determination of probable cause that a suspect has committed a

crime as a condition to any extended restraint of his liberty. 420 U.S. at 126-127. That determination must be made "either before or promptly after arrest," *id.* at 125, and it need not be a formal, adversarial proceeding where the defendant is accorded the right to counsel and the right to introduce evidence or confront witnesses against him, *id.* at 120-123. See also *Baker* v. *McCollan*, 443 U.S. 137, 143 (1979). Under *Gerstein*, the judicial officer is simply required to make the same judgment, under similar procedures, that he would make in deciding whether to authorize an arrest warrant; as the Court noted, 420 U.S. at 120, probable cause in that context "traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony."

In this case, Los Angeles County Detective John McCann sought and obtained a state search warrant a few hours before respondent's arrest. In support of that application, Detective McCann submitted a five-page affidavit, which detailed the evidence that respondent had sold heroin out of his apartment on numerous occasions.[10] The state judge issued a warrant to search both the apartment and respondent's person. In so doing he necessarily concluded that there was probable cause to believe that respondent was engaging in an ongoing pattern of heroin dealing. This is therefore not a case in which a police officer restrained the liberty of a suspect in the absence of any judicial assessment of the evidence

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[10] The search warrant and supporting affidavit (C.A. Excerpt of Record 49-55), which were submitted to the district court as an appendix to the Declaration of Detective John McCann (see Pet. App. 57a), are reprinted in the appendix to this brief. The C.A. Excerpt of Record may be found in Volume A of the record in this Court.

supporting that action. In the circumstances of this case, the state judge's decision to issue the search warrant necessarily incorporated a determination of probable cause sufficient to meet the requirements of *Gerstein*.

c. Even if respondent's Fourth Amendment rights were violated by the failure to seek a new determination of probable cause after his arrest, there would be no justification for suppressing his confession, because respondent has failed to show that the evidence he seeks to suppress is a "fruit" of the violation he claims.

The rule that evidence may not be suppressed unless it bears a sufficiently close causal connection to the claimed illegality reflects the Court's consistent refusal to use the suppression remedy to place the defendant in a better position than he would have occupied absent the illegality. As the Court recently explained:

> [T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred. When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.

Murray v. *United States*, 487 U.S. 533, 537 (1988) (quoting *Nix* v. *Williams*, 467 U.S. 431, 443 (1984)).

The Court's application of that principle in *New York* v. *Harris*, 495 U.S. 14 (1990), and *United States* v. *Montalvo-Murillo*, 495 U.S. 711 (1990), is instructive here. In *Harris*, the Court held that a confession given at the stationhouse, following an arrest effected without the

warrant required by *Payton* v. *New York*, 445 U.S. 573 (1980), was not the "fruit" of the *Payton* violation. Because the arrest was supported by probable cause, the police "had a justification to question Harris prior to his arrest" and the confession accordingly could not be viewed as "the fruit of having been arrested in the home rather than someplace else." 495 U.S. at 19. In *Montalvo-Murillo*, the Court rejected the claim that a failure to provide a suspect with a detention hearing within the time limits prescribed by the Bail Reform Act of 1984 entitled him to immunity from pretrial detention. Citing *Harris*, the Court concluded that "a person does not become immune from detention because of a timing violation." 495 U.S. at 722. Since it was clear that the suspect would have been denied bail if the applicable time limits had been observed, "the noncompliance with the timing requirement had no substantial influence on the outcome of the proceeding" and no relief was warranted as a result of the violation. *Ibid.*

The analysis in those cases answers respondent's claim here. Respondent does not claim that he was arrested without probable cause. His sole Fourth Amendment claim under *Gerstein* and *McLaughlin* concerns the *timing* of the probable cause determination. But the fact that respondent did not obtain a probable cause determination by Sunday evening did not affect the ability of the government to obtain a statement from him on Monday morning. Like the place of Harris's arrest or the timing of Montalvo-Murillo's bail hearing, the timing of respondent's *Gerstein* determination would have had no effect on his custody unless there was no probable cause to hold him. Because there was ample probable cause to believe respondent guilty of heroin trafficking, his statement must be viewed as the result of the proper

custody in which he was held by virtue of that probable cause—not as the fruit of a *Gerstein* timing violation.

d. Finally, the record reflects that in failing to present respondent to a magistrate over the weekend the state authorities relied on a California statute (Cal. Penal Code Ann. § 825 (West 1985)) that provided for a first appearance as late as 48 hours after arrest, excluding holidays and Sundays.[11] Pet. App. 57a. The automatic exclusion of holidays and Sundays was rejected by the Court in *McLaughlin*, 111 S. Ct. at 1671, but that occurred nearly three years after the state officers relied on that provision of California law in this case. This Court's decision in *Illinois* v. *Krull*, 480 U.S. 340, 349-355 (1987), which held that the exclusionary rule is inapplicable when officers rely in good faith on a statute that is later declared unconstitutional, therefore would preclude respondent from obtaining suppression of evidence in these circumstances, even if the Fourth Amendment was violated, and even if respondent had preserved the claim.

Respondent argues at length (Br. 43-49) that the state officers should have known that the California statute was unconstitutional, and that their "reckless disregard" of Fourth Amendment rights bars application of the good faith exception. But that argument is inconsistent with respondent's separate contention that *McLaughlin* effected such a sharp change in the law that *he* was justified in never having raised any Fourth

[11] At the time of respondent's arrest, California law provided that "[m]unicipal and justice courts shall not be open for the transaction of business on Saturday, which is a holiday as respects the transaction of business in municipal and justice courts." Cal. Gov't Code § 71,345 (West Supp. 1977) (repealed by 1986 Cal. Stat. 500, ch. 1398, § 5, effective Jan. 1, 1989).

Amendment claim before he arrived in this Court. In any event, this Court's cases prior to *McLaughlin* gave law enforcement officers good reason to believe in good faith that the delay that occurred here would not contravene the Fourth Amendment.

Gerstein contemplated that States would be permitted to delay the probable cause determination required by the Fourth Amendment in order to consolidate that determination with a defendant's first appearance, such as the appearance contemplated by Cal. Penal Code Ann. § 825 (West 1985), and it cited with approval a model code that provided for a probable cause determination within two "court days" of the arrest—*i.e.*, five days in the event of intervening holiday weekends. See *Gerstein*, 420 U.S. at 123-124 & n.25. And, in *Schali* v. *Martin*, 467 U.S. 253 (1984), the Court rejected a *Gerstein* challenge to a New York statute that authorized preventive detention of juveniles, and which usually provided a probable cause determination four days after arrest. *Schall* v. *Martin*, 467 U.S. at 276-277 & n.27. Noting that "*Gerstein* indicated approval of pretrial detention procedures that supplied a probable-cause hearing within five days of the initial detention," *id.* at 277 n.28, the Court found no constitutional infirmity in the New York procedures. In view of the views expressed by *Gerstein* and *Schall*, there is no force to respondent's claim that in August 1988 any reasonable officer should have known that respondent's detention violated the Fourth Amendment.[12]

[12] Respondent also contends (Br. 41-43) that a good faith exception should not be applied in this context because the California statute, unlike the statute at issue in *Krull*, permitted but did not require the officers' conduct. That contention, however, would apply equally well to bar application of the good faith exception to

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JANUARY 1994

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search warrants (which authorize but do not usually *require* searches), which is the very context in which the good faith doctrine was originally developed. See *United States* v. *Leon*, 468 U.S. 897 (1984).

Finally, respondent also contends (Br. 40-41) that the good faith doctrine is inapplicable here because the state officers violated the statute by failing to present him to a magistrate "without unnecessary delay." The essence of that contention is respondent's claim, rejected by the district court, that the delay here was unreasonable because it was for the purpose of interrogation. Indeed, respondent erroneously implies that the state prosecutor had already declined prosecution before the delay. The only reference in the record to that prosecutor's action indicates that he declined to prosecute on Monday, August 8, 1988 (Pet. App. 54a), after the weekend delay at issue here.

APPENDIX

STATE OF CALIFORNIA - COUNTY OF LOS ANGELES
SEARCH WARRANT AND AFFIDAVIT
(AFFIDAVIT)

John McCann, being sworn, says that on the basis of the information contained within this Search Warrant and Affidavit and the attached and incorporated Statement of Probable Cause, he/she has probable cause to believe and does believe that the property described below is lawfully seizable pursuant to Penal Code Section 1524, as indicated below, and is now located at the locations set forth below. Wherefore, affiant requests that this Search Warrant be issued.

/s/ John McCann, NIGHT SEARCH REQUESTED: YES[ ] NO [X]

(SEARCH WARRANT)

THE PEOPLE OF THE STATE OF CALIFORNIA TO ANY SHERIFF, POLICEMAN OR PEACE OFFICER IN THE COUNTY OF LOS ANGELES:

proof by affidavit having being made before me by *John McCann* that there is probable cause to believe that the property described herein may be found at the locations set forth herein and that it is lawfully seizable pursuant to Penal Code Section 1524 as indicated below by "x" (s) in that it:

____was stolen or embezzled

X was used as the means of committing a felony

X is possessed by a person with the intent to use it as means of committing a public offense or

is possessed by another to whom he or she may have delivered it for the purpose of concealing it or preventing its discovery.

__X__ tends to show that a felony has been committed or that a particular person has committed a felony.

____ tends to show that sexual exploitation of a child, in violation of P.C. Section 311.3 has occurred or is occurring.

YOU ARE THEREFORE COMMANDED TO SEARCH:

The residence located at 3025 Frazier Av. Apt. D in the City of Baldwin Park and County of Los Angeles. 3025 Frazier Apt. D is a one story apt. located at the rear and attached to a brown stucco one[-]story building. Apt D has a brown wood front door which faces South. The letter D is on the front of the door. Apt. D is on the northside of the walkway. The number 3025 [is] on the front portion of the building. Also any and all storage areas located there or associated with 3025 Frazier Av. Apt D.

Also the person of J/D Pedro with a possible last name of Alverez and an aka of "Tejano" described as a male Mexican approx. 40 years old, 5'6" tall and 140 to 160 lbs. with black hair[,] somewhat balding, a mustache and missing the first portion of his index finger.

Also the person of J/D Ceasar described as a male Mexican approx. 28 years old, 5'8" tall, a medium build and medium complexion, black hair, mustache and tattoos on his arms.

Also the person of J/D Terry with a possible last name of Lovato described as female Mexican about 28 years old, 5'6" tall, a light complexion, medium build and large nose.

Also any and all vehicles parked at 3025 Frazier Ave. which are under control of the occupants of 3025 Frazier Av.

FOR THE FOLLOWING PROPERTY: Heroin and narcotic[s] paraphernalia, consisting in part of, and including, but not limited to, hypodermic needles, hypodermic syringes, eye droppers, spoons, cotton, milk[,] sugar, scales and other weighing and measuring devices, and other containers of various types that are commonly associated with the storage and use of heroin, consisting in part of, but not limited to balloons, condoms, paper bindles, foil bindles, capsules; and articles of personal property that tend to establish and document the sales of heroin, consis[ting] in part, and including, but not limited to, U.S. currency, buyer lists, seller lists, ledgers and articles of personal property that tend to establish a conspiracy to sell heroin, that consist in part of and including, but not limited to, personal telephone books, telephone bills, utility bills, papers and documents that contain lists of names that tend to establish the identity of persons in control of the premises, and rent receipts, cancelled mail envelopes and keys, and all incoming telephone calls that tend to prove conspiracy to commit sales of heroin.

AND TO SEIZE IT IF FOUND and bring it forthwith before me, or this court, at the courthouse of this court. This Search Warrant and incorporated affidavit was sworn to and subscribed before me this 5th day of August, 1988 at 2:06 p.m. Wherefore I find probable cause for the issuance of the warrant and do issue it.

/s/ [illegible]. NIGHT SEARCH APPROVED: YES [] NO []

Attachment 1

Observations Of Affiant

Your affiant[,] a deputy sheriff employed by the County of Los Angeles[,] states that he has been a peace officer for 23 years and that his present assignment is NORSAT[,] a crime suppression unit.

During the first week of Aug 1988 your affiant was contacted by an inf. your affiant knows to be reliable[.] See attachment 2. During the first week of Aug 1988 this inf., inf. 1 advised your affiant that he/she has been buying grams of heroin from a friend who obtains the heroin from the rearmost apt. on the northside of the apt. complex located at 3025 Frazier in the city of Baldwin Park. Inf. 1 advised your affiant that on approx ten occasions he/she has gone with the friend to buy heroin from the apt. complex at 3025 Frazier, and that this occurred during the month of Juiy 1988 and the first week of Aug.1988. Inf. 1 further advised your affiant that on each occasion he/she went to the apt. complex at 3025 Frazier with the friend to buy heroin he/she would give the friend the money for the heroin and he/she would observe the friend walk to and enter the rearmost apt. on the northside of the complex, and return moments later after exiting said apt.[,] at which time the friend would give inf. 1 the amount of heroin purchased. Inf. 1 indicated that the last time he/she purchased or obtained heroin from the friend via the rear northside apt. was within a three day period just prior to 8-5-88. Inf. 1 also stated that on the approx ten occasions he/she has gone to the complex at 3025 Frazier he/she has obtained heroin each time. Inf. 1 stated that the friend advised that the person who is selling the

heroin from the apt. complex at 3025 Frazier is named "Tajano."

During the first week of Aug 88 inf. 1 directed your affiant to and pointed out the complex at 3025 Frazier indicating to your affiant that the friend buys the heroin from the northside rear apt. at said complex.

During the first week of Aug 88 your affiant was advised by inf. 2 that a person known as Tajano or Pedro was selling heroin from the apt. complex located at 3025 Frazier. On 8-4-88 inf. 2 directed your affiant to and pointed out the complex at 3025 Frazier[,] Baldwin Park[,] advising your affiant that "Tajano" sells heroin from the rearmost apt. on the northside of the walkway. Inf. 2 further advised your affiant that a male named Cesar and a female named Terry also live in said apt. and that Cesar at times delivered heroin for "Tajano." Inf. 2 stated that Tajano is a male Mexican about 40 years old, 5'-6" tall, 140 to 160 lbs. with dark hair[,] somewhat balding[,] a mustache[,] and missing a portion of his right index finger. Inf. 2 described Cesar as a male Mexican about 28 years old, 5'-8" tall[,] a medium build with black hair[,] a mustache[,] and tattoos on his arms. Inf. 2 stated that he/she had purchased both heroin and cocaine form Tajano and Ceasar at the indicated apt. within the complex at 3025 Frazier. However, the last time he/she (inf. 2) purchased a heroin or cocaine from said apt. was approx. tiiree weeks prior to 8-4-88. On 8-4-88 your affiant observed a male exit the rear northside apt. at 3025 Frazier. Inf. 2 advised your affiant that this male was Ceasar. On 8-4-88 inf. 2 advised your affiant that he/she has purchased heroin from "Tajano" or Caesar at said apt. on at least five occasions and has never known them to be void of heroin. Inf. 2 further stated that he/she knows the female Terry to be a heroin user having observed Terry in-

ject heroin at the indicated apt. Inf. 2 described Terry as female about 28 years old 5'-6" tall, with a medium build a light complexion and big nose and a possible last name of Lavato.

Your affiant has been a narcotics investigator for 12 years and has conducted in excess of 1,000 narcotics investigation[s]. Your affiant has testified in both Los Angeles County Superior and Municipal on numerous occasions as an expert witness re: heroin usage and puncture wounds caused by the injection of heroin.

Your affiant knows both inf. 1 and 2 to be heroin users as evidenced by puncture wounds observed on their arms over their veins which in your affiant's opinion are caused by the injection of heroin. Both inf. 1 and 2 have advised your affiant that on each occasion when they have obtained heroin from Tajano, Ceasar, or the friend of inf. 1 they have used a portion of said heroin and it has caused them to attain a lethargic condition. On 8-4-88 your affiant's partner[,] Officer Aquino[,] walked into the complex at 3025 Frazier and observed the rear northside apt. to be Apt. D. Said complex is a one story light brown stucco building. Apt. D has a brown wood front door. On 8-4-88 inf. 2 advised your affiant that "Tajano's" (aka Pedro) phone number is 818-338-0411 and that he/she has called him on several occasions at said number. On 8-5-88 your affiant contacted the local utility company and ascertained that the utility subscriber at 3025 Frazier Baldwin Park Apt. D is a Mary L. Perez[,] who listed her husband as Pedro Alverez and the home phone number as 818-338-0411.

Due to the information contained in this affidavit, your affiant is of the opinion that "Tajano" aka Pedro, Ceasar and Terry are residing at 3025 Frazier Apt.

D[,] Baldwin Park[,] where they keep and sell heroin from on a daily basis.

Your affiant knows that inf. 1 and inf. 2 are acting independent of each other re: their furnishing of this information contained in this affidavit.

Attachment 2

Reliable Informant

Your affiant wishes to keep inf. 1 and 2 identity confidential at this time because both inf. 1 and 2 have requested to remain confidential and further both have indicated that they will continue to furnish information about other law violators.

Your affiant knows inf. 1 to be reliable. During July 1988 inf. 1 furnished your affiant with information that caused the arrest of Michael Pickard for robbery. A criminal complaint has been filed on Pickard in [illegible] Muni Court charging one count 211 P.C. Again during July 1988 inf. 1 furnished your affiant with information which caused your affiant to obtain an arrest warrant for Ronnie Thornburg in Pasadena Court charging burglary[,] case number A577225. During 1987 inf. 1 furnished your affiant with information that caused the arrest of two persons for possession of heroin for sale, 96 balloons of heroin were recovered. This case was filed in [illegible] M/C Court case number A886588.